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In the Supreme Court of the United States

OCTOBER TERM, 1943

HARTFORD-EMPIRE COMPANY ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement:	
Introduction	3
I. Condition of industry at time of suit	5
1. Hartford and Owens controlled the only two manufacturing processes of general application	6
2. Specialty ware was assigned to Corning under a division of fields with Empire and Hartford	8
3. Owens, Hazel, and Hartford controlled container field	9
4. Lynch, Owens, and Hartford controlled forming machines	12
5. Hartford dominated the lehr and stacker industries	13
6. Thatcher, Owens, and Hartford controlled the milk-bottle field	13
7. Ball, Owens, Hazel, and Hartford controlled the fruit-jar field	14
8. Owens, Hazel, Hartford, Lynch, Ball, and Thatcher were combined with others in the Association to stabilize the market for glassware	15
9. Extent and effect of the patent pool	17
10. The Hartford leasing system	18
11. Royalty rates and excessive profits	19
II. History of the conspiracy	20
1. The combination of the Hartford and Corning-Empire interests	22
(a) Early objectives	22
(b) The 1916 agreement	24
(c) Joint purchase of Steimer application	25
(d) Acquisition of Hitchcock patents	26
(e) Formation of Hartford-Empire and the 1922 glass contract with Corning and Empire	27
(i) Purpose of the combination	27
(ii) Terms and effects of the contracts	29
(f) Acquisition of assets of Howard Company	33

Statement—Continued.

II. History of the conspiracy—Continued. Page

2. Hartford, with the participation of Corning, conspired with Owens to control the industry through patent domination 36

(a) Conflict between ambitions of Owens and the Hartford-Corning group settled by an alliance to control the industry 36

(i) Owens' early objective to obtain control of the glassware industry through patent domination over glass-making machinery 36

(ii) Owens' ambitions conflicted with those of Hartford and the Corning group 38

(iii) Motives and negotiations leading to the settlement between Owens and the Hartford-Corning group 39

(iv) Patent Office followed Hartford's contention in United States Glass suit that Hitchcock disclosed gob feeding 43

(v) Owens and Hartford agreed to suppress evidence of operativeness of inventions covered by expired Hitchcock patents and thereby to promote the issuance of allegedly dominant gob feed patents to Hartford 45

(vi) Purposes of Hartford and Owens in entering into the 1924 agreement 52

(vii) Corning was protected in the Hartford-Owens alliance 53

(viii) Terms of the 1924 contract 55

(ix) Effects of the 1924 contract 56

(b) Hartford and Owens seek control by uniting against their common adversaries—abuse of the patent laws 59

(i) Planning the joint campaign 59

(ii) Abandonment by Owens of prior contention on Lott 63

(iii) Shifting claims between applications and employment of other methods to obtain strongest patents possible 65

(iv) Necessity for removal of Tucker & Reeves and Miller from interferences 66

(v) Harassment of these adversaries in the Patent Office (F. 138, R. 7306) and in the courts 67

(vi) Acquisition of W. J. Miller 72

(vii) Acquisition of T. R. & B 74

(viii) Dissolution of the interferences 76

Statement—Continued.

II. History of the conspiracy—Continued.	Page
(ix) Use of Clarke article and suppression of Hitchcock demonstration in obtaining stuffing patent	76
(x) Use of Howard affidavit to obtain stuffing patent	82
(xi) Use of Clarke article and suppression of Hitchcock demonstration to obtain other dominant patents	83
(xii) Concerted action to settle the interferences so as to strengthen the pool	84
(xiii) Causing delays in the Patent Office	87
(xiv) Laying of "traps" to prevent issuance of patents to adversaries	90
(xv) Securing patents for "blocking off" and "fencing in" the patents of others	91
(xvi) Joint plan of litigation against Hazel, Kearns-Gorsuch, Lamb, Nivison-Weiskopf and Obear-Nester	94
(c) Additional patent and feeder acquisitions	95
3. Hazel joins the conspiracy	97
(a) Hazel in competition with Owens and other Hartford licensees	97
(b) Owens and Hartford sought to induce Hazel to enter the conspiracy	98
(c) Terms of the agreements	103
(d) Parties agreed not to put validity of patents in issue	108
(e) President of Owens participated in management of Hazel	110
(f) Results of 1932 "partnership arrangement" in eliminating competition	111
4. Modifications of the tripartite agreements in 1935	113
5. The forming machine conspiracy	117
(a) Motives underlying the plan to consolidate forming machine licensing in one hand	117
(b) Hartford and Owens combined to acquire Headley and Thompson patent rights	117
(c) Hartford and Owens acquired O'Neill patent rights with financial assistance of Hazel	120
(d) Hartford and Owens cooperated to induce Lynch to join the conspiracy	125
6. The lehr conspiracy	136
7. The milk-bottle conspiracy	139
(a) Owens and Hartford granted Thatcher exclusive rights in the milk-bottle field	139

Statement—Continued.
II. History of the conspiracy—Continued. Page
(b) Hartford, Thatcher, and Owens cooperated to centralize and stabilize the milk-bottle industry 142
(c) W. E. Levis obtained stock interest in Thatcher and representation on Thatcher's board 146
8. The fruit-jar conspiracy 146
(a) The roots of the conspiracy 146
(b) Preliminary negotiations for control of the fruit-jar field 147
(c) Elimination or restriction of actual or potential competitors of Ball 148
(d) Hazel and Owens agreed to restrict their production 151
(e) The Hartford-Ball agreement 155
(f) Enforcement of restrictions and extension thereof to packers' ware 155
(g) Ball acquired competing Three Rivers Glass Company 156
9. The role of the Association in the conspiracy 157
10. Creation and use of the patent pool 162
11. The Hartford leasing system 164
(a) Growth and objectives 164
(b) Licensees required to acknowledge validity of patents 168
(c) Restrictions designed to limit the markets of licensee glassware manufacturers 169
(d) Restrictions designed to limit competition between licensee glassware manufacturers 170
(e) Restrictions designed to stabilize glassware prices 171
(f) Hartford's licensees covenanted not to make unlicensed glassware on licensed machines 172
12. The role of appellants I. J. Collins, T. C. Fulton, W. V. Fisher, and J. D. Dilworth in the conspiracy 173
13. Changes effectuated by the appellants in their relations since October 1938 180
The opinion, findings, and judgment of the court below 184
Summary of argument 189
Argument:
Preliminary statement 199
I. The appellants violated the Sherman Act by combining to monopolize and to control the manufacture of glassware machinery 203
A. The patent pool was formed by the leading companies in the industry for the purpose and with the effect of restraining competition 204

Argument—Continued.
I. The appellants violated the Sherman Act, etc.—Con. Page
B. The patent pool is illegal because it is composed of patents that appellants combined to obtain for the specific purpose of monopolizing the industry 218
1. The appellants' scheme to obtain patents to monopolize the industry was formed and largely executed before the issuance of the patents they now assert are "dominant" 219
2. Appellants' treatment of their own patent claims and tactics in the Patent Office were designed, not to provide legitimate protection for their inventions, but to advance the illegal program of the combination 221
3. The appellants have attempted to control future inventions in the glass-machinery field 225
C. Appellants, acting in concert, used illegal means to obtain the "dominant" patents included in the pool 227
1. The Clarke article 230
2. Suppression of facts material to the issuance and establishment of patents 233
3. Obtaining the issuance of patents for the purpose of "blocking off" or "fencing in" the developments of others 234
4. Abuses of Patent Office procedure 237
II. The appellants have violated the Sherman Act by combining to monopolize trade in unpatented glassware .. 239
1. The division of fields 241
2. Restrictions as to quantity 243
3. Stabilization of prices 244
4. The licensing system 246
5. The control exercised over unpatented glassware was illegal 248
III. The arguments of the separate appellants as to why they were not parties to the conspiracy are without merit .. 254
A. Corning 254
B. Owens 257
C. Hazel 258
1. Conduct apart from the agreements 259
2. The agreements were invalid 261
(a) There was no patent deadlock 267
(b) The claim as to Lott 269
D. Lynch and the forming machine conspiracy 274
1. Hartford and Owens aided Lynch to eliminate competition through the acquisition of Ed Miller 274
2. The forming machine agreement was illegal 276
(a) The forming machine agreement was illegal under the Sherman Act 276

Argument—Continued.

	Page
III. The arguments of the separate appellants, etc.—Cont'd.	
(b) The forming machine agreement tied together formers and feeders and was therefore illegal under the Clayton Act	278
E. Hartford and Owens as to Lehrs	284
F. Thatcher	287
G. Ball	288
H. The Glass Container Association	292
1. The Association was used to limit production and exclude newcomers from the industry	292
2. The Association was used as a vehicle to establish a system of price leadership	299
I. The individual appellants	300
1. Individuals associated with the corporate appellants	300
2. Appellants I. J. Collins, Fulton, Fisher, and Dilworth	303
(a) The evidence	303
(b) Variance	306
(c) The propriety of the order on rehearing	309
IV. The illegal practices have neither been abandoned nor rendered moot under such circumstances as to warrant any modification of the final judgment	311
A. In general	311
B. The Association has shown no abandonment	318
C. Owens has shown no abandonment	319
V. The judgment of the court below is designed to give effective relief and should not be modified except in certain minor respects	327
Conceded modifications	327
Introductory	328
A. Royalty-free compulsory licensing is in this case a proper remedy to "prevent and restrain" further violations of the Sherman Act	330
1. The need for royalty-free compulsory licensing	338
(a) Compulsory licensing	338
(b) Royalty-free	344
2. Royalty-free compulsory licensing in the circumstances of this case is lawful	349
(a) The intention of Congress	350
(b) Confiscation	353
(1) As to property generally	353
(2) As to patents in particular	355
(3) Nothing of value was taken	359
B. Compulsory licensing is properly implemented by injunctions against enforcement of patent rights	361
C. Compulsory licensing at a reasonable royalty was properly extended to future patents—paragraph 24 (B)	363

Argument—Continued.
V. The judgment of the court, etc.—Continued. Page
D. Appellants were properly enjoined from acquiring, except from the Patent Office, other than non-exclusive rights under patents covering inventions.. 369
E. The judgment properly neutralizes illegal features of the licensing system..... 372
1. Leasing of equipment..... 372
2. Injunction against express contract provisions that licensees shall not contest validity of patents..... 376
3. Injunction against requirement that rights to improvements by licensees shall become exclusive property of licensor..... 377
4. Injunction against restrictive licensing..... 378
F. Blocking off, fencing in, and concerted action in the Patent Office were properly enjoined..... 382
G. The contracts and license agreements were properly canceled..... 385
H. The contracts executed subsequent to the suit and affecting the status quo were properly canceled... 387
I. Remedies affecting patent rights were properly extended to Corning's ribbon machine..... 388
J. Remedies affecting patent rights were properly extended to appellants Ball and Thatcher, and to the individual appellants..... 390
K. The judgment was appropriate to remedy the illegal practices of the other appellants through the Association..... 392
L. Injunctions against interlocking directorates, security holdings, and the acquisition of competing concerns were proper..... 399
M. Ball and Lynch are properly required to sell the assets of competing concerns which they acquired. 402
N. The provisions with respect to inspection by the Department of Justice of the records of the corporate appellants were proper..... 403
O. The receivership was proper and necessary..... 405
P. The distribution of earmarked and impounded funds. 408
1. Earmarked funds..... 408
2. The impounding order for funds due under the Hartford-Hazel agreement..... 409
3. The payments from Hartford to Ball and Corning. 413
Conclusion..... 414
Appendix (for table of contents, see *infra*, p. 414)..... 415

CITATIONS

Cases: Page

Addyston Pipe & Steel Co. v. *United States*, 175 U. S. 211, affirming 85 Fed. 271 ..... 242, 249, 277
Aero Spark Plug Co. v. *B. G. Corp.*, 130 F. (2d) 290 355
Allen v. *Riley*, 203 U. S. 347 356
Altoona Theatres v. *Tri-Ergon Corp.*, 294 U. S. 477 356
American Column & Lumber Co. v. *United States*, 257 U. S. 377 ..... 246, 249, 294
American Equipment Company v. *Tuthill*, 69 F. (2d) 406 ..... 250, 254
American Smelting and Refining Co. v. *Bunker Hill Co.*, 248 Fed. 172 411
Apex Hosiery Co. v. *Leader*, 310 U. S. 469 ..... 249, 275
Appalachian Coals, Inc., v. *United States*, 288 U. S. 344 294
Aspinwall Manufacturing Co. v. *Gill*, 32 Fed. 697 253
B. B. Chemical Co. v. *Ellis*, 314 U. S. 495 330
B. F. Avery & Sons v. *J. I. Case Plow Works*, 174 Fed. 147 221
Baltimore and Ohio R. Co. v. *Interstate Commerce Commission*, 221 U. S. 612 404
Bankers Life Insurance Co. v. *Ohrt*, 131 Nebr. 858 390
Barber Asphalt Corp. v. *LaFero Grecco Contr. Co.*, 116 F. (2d) 211 284
Barbier v. *Connally*, 113 U. S. 27 353
Bateman v. *Donovan*, 131 F. (2d) 759 311
Bedford v. *United States*, 192 U. S. 217 354
Bement v. *National Harrow Co.*, 186 U. S. 70 ..... 206, 251, 252
Bloomer v. *McQuewan*, 14 How. 539 355
Blount Manufacturing Co. v. *Yale & Towne Manufacturing Co.*, 166 Fed. 555 ..... 207, 242
Bowman v. *Loperna*, 311 U. S. 262 ..... 310, 311
Boyle v. *United States*, 259 Fed. 803 307
Bradford v. *United States*, 152 Fed. 617 307
British Hartford-Fairmont Syndicate v. *Jackson Bros. (Knottingley) Ltd.*, 49 R. P. C. 495 (C. A. 1932), aff'd 51 R. P. C. 254 (H. L. 1934) 224
Brown v. *Duchesne*, 19 How. 183 357
Butchart v. *United States*, 295 Fed. 577 242
Butte & Superior Copper Co., Ltd. v. *Clark Montana Realty Co.*, 249 U. S. 12 291
Cammeyer v. *Newton*, 94 U. S. 225 355
Carbide Corp. v. *American Patents Development Corp.*, 283 U. S. 27 ..... 191, 217, 240, 281, 359
Central Kentucky Gas Co. v. *Railroad Commission*, 290 U. S. 264 363
Chamber of Commerce v. *Federal Trade Commission*, 13 F. (2d) 673 366
Cinema Patents Co., Inc. v. *Columbia Pictures Corp.*, 62 F. (2d) 310 253

Cases—Continued.

Page

Continental Insurance Co. v. *United States*, 259 U. S. 156... 354, 394, 402
Continental Paper Bag Co. v. *Eastern Paper Bag Co.*, 210 U. S. 405... 236
Dorrell v. *Clark*, 90 Mont. 585... 359
Davis v. *Patrick*, 141 U. S. 479... 307
Deacon v. *United States*, 124 F. (2d) 352... 315
Delaware & A. T. & T. Co. v. *Delaware*, 50 Fed. 677... 274
Delmar Jockey Club v. *Missouri*, 210 U. S. 324... 356
Dr. Miles Medical Company v. *Parke & Sons Co.*, 220 U. S. 373... 221
Duplex Co. v. *Deering*, 254 U. S. 443... 229
Eastern States Retail Lumber Dealers Assn. v. *United States*, 234 U. S. 600... 292, 322
Electric Bond and Share Co. v. *Securities & Exchange Commission*, 306 U. S. 419... 338
Electric Storage Battery Co. v. *Shimadzu*, 307 U. S. 5... 73
Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436... 191, 199, 202, 218, 228, 240, 248, 249, 250, 251, 262, 278, 281, 340, 373, 378, 385.
Ewart Mfg. Co. v. *Baldwin Cycle-Chain Co.*, 91 Fed. 262... 236
F. A. D. Andrea, Inc. v. *Radio Corp. of America*, 14 F. Supp. 226, aff'd 88 F. (2d) 474, cert. denied, 300 U. S. 681... 368
Farmers' Loan and Trust Co. v. *Galesburg*, 133 U. S. 156... 356
Fashion Guild v. *Federal Trade Commission*, 312 U. S. 457... 397
Federal Trade Commission v. *Goodyear Co.*, 304 U. S. 257... 313, 314, 316
Federal Trade Commission v. *Standard Education Society*, 86 F. (2d) 692, modified in other respects 302 U. S. 112... 314
Federal Trade Comm'n v. *Thatcher Mfg. Co.*, 5 F. (2d) 615... 139
Federal Trade Comm'n v. *Thatcher Mfg. Co.*, 272 U. S. 554... 139
Fowler v. *Harrison*, 39 Wash. 617... 358
Frey & Son v. *Cudahy Packing Co.*, 256 U. S. 208... 322
General Electric Co. v. *Hygrade Sylvania Corp.*, 45 F. Supp. 714... 362
General Excavator Co. v. *Keystone Driller Co.*, 290 U. S. 240... 233
General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175, aff'd 305 U. S. 124... 251
George Close Co. v. *Ideal Wrapping Mach. Co.*, 29 F. (2d) 533... 253
Gibbs v. *McNeely*, 118 Fed. 120... 249
Gile v. *Duke*, 5 F. (2d) 952... 305
Good Humor Corporation of America v. *Popsicle Corporation of United States*, 59 F. (2d) 344... 253
Goodyear Tire & Rubber Co. v. *Marhofer*, 38 Oh. App. 143... 305
Gormley v. *Bunyan*, 138 U. S. 623... 307

Cases—Continued. Page

Goshen Rubber Works v. *Single Tube Automobile & Bicycle Tire Co.*, 166 Fed. 431 253
Grant Bros. v. *United States*, 232 U. S. 647 308
Grayson v. *Lynch*, 163 U. S. 468 307
Hadacheck v. *Los Angeles*, 239 U. S. 394 354
Hamilton Investment Co. v. *Bollman*, 268 Fed. 788 315
Hamilton v. *Withredge*, 11 Md. 128 343
Hartford-Empire Co. v. *Coe*, 87 F. (2d) 741 ..... 84, 232
Hartford-Empire Co. v. *Hazel-Atlas Co.*, 39 F. (2d) 111, reversed 59 F. (2d) 399 ..... 84, 99, 100, 224, 230, 267, 273
Hartford-Empire Co. v. *Hazel-Atlas Glass Co.*, 137 F. (2d) 621, certiorari pending No. 398 ..... 101, 233
Hartford-Empire Co. v. *Nivison-Weiskopf Co.*, 58 F. (2d) 701 ..... 223, 267
Hartford-Empire Co. v. *Shawkee Glass Co.*, 68 F. (2d) 726 256
Hartford-Fairmont Company v. *United States Glass Company* 2 F. (2d) 109 44
Hazel-Atlas Glass Co. v. *Hartford-Empire Co.*, Civ. No. 4894, N. D. Ohio, W. Div 264
Heirs of Garland v. *Choctaw Nation*, 256 U. S. 439 307
Henry v. *Dick Co.*, 224 U. S. 1 252
Hershey Chocolate Corp. v. *Federal Trade Commission*, 121 F. (2d) 968 ..... 367, 394
Hofferman v. *Simmons*, 290 N. Y. 449 359
Homer Brooke Glass Co. v. *Hartford-Fairmont Co.*, 262 Fed. 427 39
H. P. Hood and Sons, Inc. v. *United States*, 97 F. (2d) 677, aff'd 307 U. S. 588 411
Hyde v. *United States*, 225 U. S. 347 ..... 312, 319
Illinois Central R. Co. v. *Griffin*, 80 Fed. 278 305
Indianapolis Traction and Terminal Co. v. *Lawson*, 143 Fed 834 307
Industrial Association v. *United States*, 268 U. S. 64 317
International Business Machines Corp. v. *United States*, 298 U. S. 131 ..... 191, 240, 280
Interstate Circuit, Inc. v. *United States*, 306 U. S. 208 ..... 237, 242, 250, 262, 285, 291, 322
John Woods & Sons v. *Carl*, 203 U. S. 358 356
Joly v. *Salem*, 276 Mass. 297 360
Jones v. *Securities and Exchange Commission*, 298 U. S. 1 ..... 388, 413
Joplin and P. Railway Co. v. *Public Service Commission of Missouri*, 267 Fed. 584 411
Julius Kayser & Co. v. *Rosedale Knitting Co.*, 98 F. (2d) 839, cert. denied 305 U. S. 649 238
Kern River Co. v. *United States*, 257 U. S. 147 356
Ketcham v. *Miller*, 104 Oh. St. 372 305

Cases—Continued. Page

Keystone Driller Company v. *General Excavator Co.*, 290 U. S. 240 ..... 193, 228, 234, 345, 347, 348, 358
Labor Board v. *Express Pub. Co.*, 312 U. S. 426 ..... 366, 380
Lawton v. *Steele*, 152 U. S. 133 353
Lee Line Steamers, Inc. v. *Memphis H. & R. Packet Co.*, 277 Fed. 5 277
Leitch Mfg. Co. v. *Barber Co.*, 302 U. S. 458 ..... 191, 240, 359
Libbey Glass Co. v. *McKee Glass Co.*, 216 Fed. 172, aff'd 220 Fed. 672, cert. denied 238 U. S. 624 253
Lillard v. *Lonergan*, 72 F. (2d) 865, cert. denied 293 U. S. 615 355
Local 167 v. *United States*, 291 U. S. 293 .. 312, 319, 330, 367, 379
Lord v. *Radio Corp. of America*, 24 F. (2d) 565, aff'd 28 F. (2d) 257, cert. denied, 278 U. S. 648 282
Malloy v. *New York Life Ins. Co.*, 103 F. (2d) 439, cert. denied 308 U. S. 572 291
Maple Flooring Association v. *United States*, 268 U. S. 563 .. 294, 296, 397
Marconi Wireless Telegraph Co. v. *United States*, 87 L. Ed. 1926 390
McCandless v. *Furland*, 296 U. S. 140 293
Mellen v. *Moline Iron Works*, 131 U. S. 352 388
Milk Wagon Drivers Union v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287 ..... 367, 380
Milwaukee & Minnesota R. Co. v. *Soutter*, 154 U. S. 540 ... 406
Mitchell v. *Hawley*, 16 Wall. 544 251
Monongahela Bridge Co. v. *United States*, 216 U. S. 177 .. 354
Moore v. *Atlantic Coast Line R. Co.*, 137 S. C. 319 390
Morton Salt Co. v. *Suppiger Co.*, 314 U. S. 488 ..... 191, 193, 205, 228, 240, 250, 253, 345, 359, 361, 362
Motion Picture Patents Co. v. *Universal Film Mfg. Co.*, 235 Fed. 398, aff'd on other grounds 243 U. S. 502 .. 251, 281, 284, 359
Mugler v. *Kansas*, 123 U. S. 623 354
Nashua Savings Bank v. *Anglo-American Co.*, 189 U. S. 221 .. 308
Nashville, C. & St. L. Ry. Co. v. *M'Connell*, 82 Fed. 65 343
National Harrow Co. v. *Hench*, 83 Fed. 36 274
National Lock Washer Co. v. *George K. Garrett Co., Inc.*, 137 F. (2d) 255 ..... 360, 362
Nebbia v. *New York*, 291 U. S. 502 353
New York Electric Lines v. *Empire City Subway*, 235 U. S. 179 356
New York v. *United States*, 257 U. S. 591 356
North American Co. v. *Securities & Exchange Commission*, 133 F. (2d) 148 354
Northern Securities Co. v. *United States*, 193 U. S. 197 .. 207, 332, 402
Noska v. *Mills*, 141 S. W. (2d) 429 390
Obear-Nester v. *Hartford-Empire Co.*, 39 F. (2d) 769 223
O'Brien v. *United States*, 51 F. (2d) 674 202
Olsness v. *Home Insurance Co.*, 14 F. (2d) 907 358

Cases—Continued. Page

Omnia Commercial Co. v. *United States*, 261 U. S. 502 354
Oregon and California R. R. v. *United States*, 238 U. S. 393 .. 367
Oxford Varnish Corp. v. *Ault & Wiborg Corp.*, 83 F. (2d) 764 280
Ozan Lumber Co. v. *Union Co. National Bank*, 207 U. S. 251 .. 356
Pan American Co. v. *United States*, 273 U. S. 456 359
Paramount Famous Lasky Corp. v. *United States*, 282 U. S. 30 242
Patterson v. *Kentucky*, 97 U. S. 501 356
Patterson v. *United States*, 222 Fed. 599 309
Pennsylvania v. *Williams*, 294 U. S. 176 342
People v. *Luciano*, 277 N. Y. 348 309
Pfister v. *Dyar*, 59 U. S. P. Q. 91 ..... 359, 360
Pfister v. *Northern Illinois Finance Corp.*, 317 U. S. 262 .. 310
Philadelphia Creamery Supply Co. v. *Davis & Rankin Co.*, 77 Fed. 879 376
Pittsburgh Forgings Co. v. *American Foundry Co.*, 41 F. Supp. 841, aff'd 102 F. (2d) 964, cert. denied, 308 U. S. 566 311
Pope Mfg. Co. v. *Gormully*, 144 U. S. 224 376
Pope Manufacturing Co. v. *Owsley*, 27 Fed. 100 253
Pope v. *United States*, 289 Fed. 312 307
Public Service Commission v. *Havemeyer*, 296 U. S. 506 355
Radio Corp. of America v. *Hygrade Sylvania Corp.*, 10 F. Supp. 879 368
Radio Craft Co. v. *Westinghouse Electric & Mfg. Co.*, 7 F. (2d) 432 253
Railroad Co. v. *Lindsay*, 4 Wall. 650 307
Realty Holding Co. v. *Donaldson*, 268 U. S. 398 308
Rees v. *Lombard*, 21 F. (2d) 276 221
Remington Cash Register Co. v. *National Cash Register Co.*, 6 F. (2d) 585 238
Remus v. *United States*, 291 Fed. 501 307
Reynolds v. *McMan Oil & Gas Co.*, 11 S. W. (2d) 778 390
Robinson v. *United States*, 33 F. (2d) 238 309
Rubber Company v. *Goodyear*, 9 Wall. 788 251
Safeway Stores, Inc. v. *Coe*, 136 F. (2d) 771 311
Schefano v. *United States*, 84 F. (2d) 513 307
Schwartz v. *McQuaid*, 214 Ill. 357 357
Sears, Roebuck & Co. v. *Federal Trade Commission*, 258 Fed. 307 314
Securities and Exchange Commission v. *Fiscal Fund*, 48 F. Supp. 712 406
Securities and Exchange Commission v. *Lawson*, 24 F. Supp. 360 313
Seymour v. *Hawkins*, 5 F. R. Service 692 310
Seymour v. *Osborne*, 11 Wall. 516 355
Shawkee Mfg. Co. v. *Hartford-Empire Co.*, 137 F. (2d) 621, certiorari pending No. 423 233

Cases—Continued. Page

Shawkee Mfg. Co. v. *Hartford-Empire Co.*, 68 F. (2d) 726, cert. denied, 292 U. S. 640 232
Siegal v. *Portage Yellow Cab Co.*, 23 Oh. App. 438 305
Sinko Tool & Mfg. Co. v. *Casco Products Corp.*, 89 F. (2d) 916 253
Sizer & Co. v *Chiarello Bros.*, 32 F. (2d) 333 390
Slayter & Co. v. *Stebbins-Anderson Co.*, 31 F. Supp. 96, aff'd on other grounds, 117 F. (2d) 848 262
Standard Oil Co. v. *United States*, 221 U. S. 1 .. 196, 330, 331, 352, 366, 402, 403
Standard Oil Co. v. *United States*, 283 U. S. 163 .. 192, 206, 207, 212, 214, 217, 266, 277, 317, 368
Standard Sanitary Manuf'g Co. v. *United States*, 226 U. S. 20 ..... 192, 206, 249, 274, 397
Stephens v. *United States*, 41 F. (2d) 440 320
Stevens v. *Guade*, 9 La. App. 664 390
Strait v. *National Harrow*, 18 N. Y. S. 224 242
Sugar Institute, Inc. v. *United States*, 297 U. S. 553 .. 246, 294, 296, 397
Suggs v. *Mutual Ben. Health & Acc. Assn.*, 115 F. (2d) 80 .. 311
Swift and Co. v. *United States*, 196 U. S. 375 ..... 202, 366
Swindell v. *Youngstown Sheet & Tube Co.*, 230 Fed. 438 355
Tower Hill-Connellsville Coke Co. v. *Piedmont Coal Co.*, 64 F. (2d) 817 342
Tribolet v. *United States*, 11 Ariz. 436 306
Truax v. *Corrigan*, 257 U. S. 312 ..... 229, 355
Union Pacific R. Co. v. *United States*, 213 U. S. 450 366
United Chromium, Inc. v. *General Motors Corp.*, 85 F. (2d) 577. 73
United Shoe Machinery Corp. v. *United States*, 258 U. S. 451 ..... 280, 313, 316, 355, 385
United States v. *3376.1 Acres of Land*, 27 F. Supp. 1023 ... 310
United States v. *Aerofin Corp.* (S. D. N. Y.), Civ. 20–458 (March 1943) 346
United States v. *Aluminum Co.* (S. D. N. Y.), Civ. 18–31 (April 1942) 346
United States v. *American Linseed Oil Co.*, 262 U. S. 371 .. 295, 397
United States v. *American Tobacco Co.*, 1 Decrees and Judgments in Federal Antitrust Cases 394, 400, 405
United States v. *American Tobacco Co.*, 221 U. S. 106 (decree reported in 191 Fed. 371 (S. D. N. Y.)) .. 227, 327, 331, 337, 354, 406, 410
United States v. *American Tobacco Co.*, 226 U. S. 106 403
United States v. *Aqua Systems* (S. D. N. Y.), Civ. 19–516 (November 1942) 346
United States v. *Associated Press* (New York Times, Oct. 7, 1943, p. 16) 351
United States v. *Assn. of American Railroads*, 36 F. Supp. 225 313

Cases—Continued. Page

United States v. *Bates Valve Bag. Corp.*, 39 F. (2d) 162 316
United States v. *Cement Securities Co.* (D. Col.), Dec. 13, 1924 403
United States v. *Chicago Butter & Egg Board*, 1 Decrees and Judgments in Federal Antitrust Cases, 259 394
United States v. *Coal Dealers Ass'n*, 85 Fed. 252 410
United States v. *Colangelo*, 27 F. Supp. 921 310
United States v. *Columbia Gas & Electric Corp.*, 36 F. Supp. 488 394
United States v. *Corn Products Refining Co.* (S. D. N. Y.), March 31, 1919 403
United States v. *Corn Products Refining Co.*, 234 Fed. 964, appeal dismissed, 249 U. S. 621 198, 317, 365, 379
United States v. *Crescent Amusement Co.* (M. D. Tenn.), March 3, 1943 403
United States v. *Darby*, 312 U. S. 100 338, 354
United States v. *E. I. du Pont de Nemours & Co.*, 188 Fed. 127, 273 Fed. 869 331
United States v. *E. I. du Pont de Nemours & Co.*, 1 Decrees and Judgments in Federal Antitrust Cases, 195 354, 367, 400
United States v. *Eastman Kodak Co.*, 226 Fed. 62, appeal dismissed, 255 U. S. 578 249
United States v. *Eastman Kodak Co.* (S. D. N. Y.), Feb. 1, 1921 403
United States v. *First National Pictures*, 282 U. S. 44 242
United States v. *Ford*, 58 F. (2d) 1029 202
United States v. *Francis*, 144 Fed. 520 307
United States v. *Gaffney*, 10 F. (2d) 694 353
United States v. *General Electric Co.*, 272 U. S. 476 251
United States v. *General Electric Co.*, N. J. Civ. 1364 (Westinghouse Decree, April 1942) 346
United States v. *General Motors Corp.*, 121 F. (2d) 376, cert. denied, 314 U. S. 618 306, 309
United States v. *Great Lakes Towing Co.*, 208 Fed. 733 343
United States v. *Great Lakes Towing Co.*, 217 Fed. 656, appeal dismissed, 245 U. S. 675, 1 Decrees and Judgments in Federal Antitrust Cases, 253 406
United States v. *Hamburg-American Co.*, 239 U. S. 466 314
United States v. *International Business Machines Corp.*, 298 U. S. 131 385
United States v. *International Harvester Co.* (D. Minn.), Nov. 2, 1918 403
United States v. *International Harvester Co.*, 214 Fed. 987, appeal dismissed, 248 U. S. 587 406
United States v. *Joint Traffic Association*, 171 U. S. 505 355, 356
United States v. *Kearney & Trecker Corp.* (N. D. Ill.), Civ. 3337 (1941) 346

Cases—Continued. Page

United States v. *Kryptok Co.*, 11 F. (2d) 874 314
United States v. *Lake Shore & Michigan Southern Railway Co.*, 1 Decrees and Judgments in Federal Antitrust Cases, 289 405
United States v. *Lehigh Valley R. Co.*, 254 U. S. 255 331
United States v. *American Linseed Oil Co.*, 262 U. S. 371 295
United States v. *MacAndrews & Forbes Co.*, 149 Fed. 823, appeal dismissed, 212 U. S. 585 ..... 242, 306
United States v. *Masonite Corp.*, 316 U. S. 265 ..... 202, 205, 206, 213, 216, 249, 250, 251, 252, 273, 316
United States v. *Morgan*, 307 U. S. 183 411
United States v. *Motion Picture Patents Co.*, 225 Fed. 800, appeal dismissed, 247 U. S. 524 ..... 202, 207, 274
United States v. *New Departure Mfg. Co.*, 204 Fed. 107 207
United States v. *New Departure Mfg. Co.*, 1 Decrees and Judgments in Federal Antitrust Cases, 471 405
United States v. *New England Fish Exchange*, 258 Fed. 732 ..... 344, 394
United States v. *Nome Retail Grocery Men's Assn.*, 1 Decrees and Judgments in Federal Antitrust Cases, 86 392
United States v. *Pullman Co.*, 50 F. Supp. 123 ..... 316, 344, 374, 403
United States v. *Railway Employees Dept.*, 286 Fed. 228 313
United States v. *Reading Co.*, 226 U. S. 324 339
United States v. *Reading Co.*, 253 U. S. 26 331
United States v. *Rock Royal Cooperative*, 307 U. S. 533 353
United States v. *Schine Chain Theatres, Inc.*, 31 F. Supp. 270 410
United States v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 ..... 246, 275, 283, 297
United States v. *Southern Pacific Co.*, 259 U. S. 214 354
United States v. *Standard Oil Co.*, 33 F. (2d) 617, rev'd on other grounds 283 U. S. 163 377
United States v. *Swift and Company*, 286 U. S. 106 ..... 329, 339
United States v. *Terminal Association of St. Louis*, 1 Decrees and Judgments in Federal Antitrust Cases, 96, 98 405
United States v. *Terminal R. R. Assn.*, 224 U. S. 283 343
United States v. *Trans-Missouri Freight Assn.*, 166 U. S. 290 ..... 314, 316, 330, 366
United States v. *Trans-Missouri Freight Assn.*, 1 Decrees and Judgments in Federal Antitrust Cases, 7 392
United States v. *Union Pacific R. Co.*, 226 U. S. 61 ..... 275, 402
United States v. *Union Pacific R. Co.*, 226 U. S. 470 ..... 330, 402
United States v. *Union Pacific R. Co.*, 1 Decrees and Judgments in Federal Antitrust Cases, 208, 215, 217–29 ..... 400, 405
United States v. *United Shoe Machinery Co.*, 247 U. S. 32 216
United States v. *U. S. Steel Corp.*, 251 U. S. 417 ..... 317, 331
United States v. *Univis Lens Co.*, 316 U. S. 241 ..... 202, 205, 228, 248, 249, 251, 262, 278, 340, 362, 373, 378, 385
United States v. *Winslow*, 227 U. S. 202 216

Cases—Continued. Page

Venner v. *Pennsylvania Steel Co.*, 233 Fed. 407 411
Virginia Electric & Power Co. v. *N. L. R. B.*, 63 S. Ct. 1214 .. 353
Virginian Ry. Co. v. *System Federation No. 40*, 300 U. S. 515 .. 342
Vulcan Mfg. v. *Maytag Co.*, 73 F. (2d) 136, appeal dismissed, 294 U. S. 734 253
Westinghouse Electric & Mfg. Co. v. *Tri-City Radio Electric Supply Co.*, 23 F. (2d) 628 253
Williams Co. v. *Shoe Machinery Corp.*, 316 U. S. 364 234
Williams v. *United States*, 3 F. (2d) 933 322
Wilson v. *Sullivan*, 25 Ky. 1110 358
Woodbridge v. *United States*, 263 U. S. 50 238

Statutes:

Clayton Act, Sec. 3 (c. 323, 38 Stat. 731, 15 U. S. C. 14) 3, 279
Emergency Price Control Act (50 U. S. C. App. § 905) 398
Expediting Act of Feb. 11, 1903, as amended, Sec. 2 (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. 29) 2
Miller-Tydings Act (15 U. S. C. § 1) 398
Sherman Act of July 2, 1890:
Sections 1 and 2, as amended (c. 647, 26 Stat. 209, 15 U. S. C. 1, 2) 2
Section 4 (26 Stat. 209-10, 15 U. S. C. A. 4) 330, 410
Small Business Mobilization Act (50 U. S. C. App. § 1112) .. 398
Webb-Pomerene Act (50 U. S. C. App. § 62) 398

Miscellaneous:

3 Am. Juris. (Appeal and Error), Secs. 841–4 308
42 Col. L. Rev. 882 358
F. R. C. P. Rules:
6 (b) 310
15 (b) 308
59 (b) 310
Hearings Before the Senate Committee on Interstate Commerce, 63d Cong., 2d Sess., *Trust Legislation*, Vol. 2, p. 1078 236
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Rule 94, Rules of Practice in Patent Office 68
Vaughan, *The Relation of Patents to Industrial Monopolies* (1932), 14 Journal Pat. Off. Soc. 95 236
Webster's *New International Dictionary* (2nd ed. 1942) 297
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Wood (1942), *Patents and Antitrust Law* 204, 281, 358
51 Yale L. J. 1012 358

In the Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 7–16

HARTFORD-EMPIRE COMPANY ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court is reported in 46 F. Supp. 541. An earlier opinion of the district court, denying six motions of the defendants to enter decrees granting certain limited relief to which said defendants were willing to consent is reported in 1 F. R. D. 424.

JURISDICTION

The final judgment of the district court was entered on October 8, 1942 (R. 7653–92). Eight appeals of nine corporate defendants and associated individual defendants were allowed on

December 3, 1942 (R. 7744–5, 7777, 7806, 7833, 7847–8, 7869, 7881–2, 7898–9), and two appeals of four individual defendants were allowed on December 7, 1942 (R. 7912, 7925). Jurisdiction is conferred on this Court by Section 2 of the Expediting Act of February 11, 1903, as amended, 32 Stat. 823, 36 Stat. 1167, 15 U. S. C., sec. 29, and Section 238 of the Judicial Code, as amended, 36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C., sec. 345. Probable jurisdiction in all of the appeals was noted March 1, 1943.

QUESTIONS PRESENTED

1. Whether the antitrust laws are violated by a combination which monopolizes and restrains competition in glass-making machinery by obtaining control of all significant patents on the machines whenever and by whomever invented, and by whatever means are necessary, whether lawful or unlawful, and which uses the power thus obtained, together with a trade association and certain other collateral devices, to monopolize and to restrain competition in unpatented glassware.

2. Whether the various appellants are shown by the evidence to have participated in the conspiracy.

3. Whether, if the appellants are found to have violated the antitrust laws in the above respects, the provisions of the judgment are proper.

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act of July 2, 1890, c. 647, 26 Stat. 209, as amended by the Act of

August 17, 1937, c. 690, 50 Stat. 693, 15 U. S. C., secs. 1 and 2, and Section 3 of the Clayton Act of October 15, 1914, c. 323, 38 Stat. 731, 15 U. S. C., sec. 14, are set out in appellants' briefs.

STATEMENT

INTRODUCTION

These are appeals from the judgment of the United States District Court for the Northern District of Ohio, Western Division, adjudicating that appellants had violated Sections 1 and 2 of the Sherman Act,[1] and attempting, by numerous injunctive provisions, to destroy the monopoly found to exist (R. 7653–92). The suit was commenced by a complaint filed December 11, 1939, which alleged that appellants were unlawfully combining and conspiring to restrain and monopolize (1) interstate and foreign trade and commerce in patents covering the manufacture and licensing of glassmaking machinery, (2) the manufacture and distribution of glassmaking machinery, and (3) the manufacture, distribution, and sale of glass products (R. 12). Most of the charges were denied by appellants in their answers.

The complaint named 12 corporate and 101 individual defendants (R. 1–2). It was dismissed against three of the corporate and 40 of the in-

[1] Two of the appellants were held to have violated Section 3 of the Clayton Act (Op. R. 72; Concls. 65–6, R. 7415).

dividual defendants (Jdgt. par. 60, R. 7692).[2] No cross-appeal was taken by the United States.

In an effort to facilitate the disposition of the case by settlement, the court held many pre-trial conferences from June 21, 1940, to February 13, 1941 (R. 573–634). Between the filing of the complaint and the trial, appellants took various steps, which will be hereinafter described, materially altering their position with respect to substantial issues. On the basis of these steps, alleged to have been taken to eliminate the practices complained of, seven of the defendants filed six motions to enter so-called "consent decrees" enjoining certain practices, limiting the issues and dismissing the complaint as against certain of the defendants (cf. R. 429–461). The motions were all overruled (1 F. R. D. 424).

Trial commenced March 3, 1941, consumed 112 trial days (Asso. Br. 6), and terminated on January 21, 1942 (R. 6737, 6810).

Upon motion of the appellee (R. 461) the court on May 9, 1941, made an interlocutory order (R. 519) impounding reciprocal payments falling due between appellants Hartford-Empire Company (hereinafter referred to as Hartford) and Hazel-Atlas Glass Company (hereinafter referred to as Hazel) under a patent cross-licensing agreement

[2] Stevenson Corporation was dismissed prior to the trial and Anchor Hocking Glass Corporation and Liberty Glass Company were dismissed on motions filed at the close of the Government's case (R. 530–2).

of July 1, 1932, between said appellants, which the court held had been shown, *prima facie,* to be illegal.[3] The order was supported by findings of fact (R. 514) and conclusions of law (R. 518).

Final arguments were held June 26 through July 2, 1942.

The court rendered its decision on August 25, 1942, and on the same date appointed a receiver to operate the business of Hartford and maintain the *status quo.* After full hearings as to its form, final judgment was entered October 8, 1942 (R. 7653).

I

Condition of Industry at Time of Suit

It will contribute to a clearer understanding of the issues presented and the history of the conspiracy to summarize at the outset the situation which prevailed in the glassware[4] industry at the time the complaint was filed and the case tried.[5]

[3] By September 1943 Hazel had deposited about $1,900,000 and up to July 1942 Hartford had deposited about $2,100,000 with the clerk of the court under this order (cf. Hazel Br. p. 53).

[4] As used in this brief, the term "glassware" includes not only glass containers, such as bottles and jars, but also non-container ware which includes all other articles made of glass, except flat glass, structural glass and fiberglass. Cf. Final Judgment, par. 1 (A), (B), and (C) (R. 7654–5).

[5] Findings of fact and other record references which are strictly applicable to periods subsequent to the filing of the complaint are, nevertheless, cited in support of the statement of conditions existing at that time unless the record indicates some reason to believe that such conditions did not then prevail.

1. *Hartford and Owens controlled the only two manufacturing processes of general application.*— When this suit was brought, the manufacture of glassware by hand had been almost completely superseded by two automatic processes; the suction machine process, controlled by the appellant Owens-Illinois Glass Company (hereinafter referred to as Owens) and the gob feed process,[6] controlled by Hartford (cf. U. F.[7] 27, R. 7283).[8] This

[6] A type of feeder, known as the stream feeder, though inferior to the gob feeder controlled by Hartford (R. 4317), was successfully employed in the manufacture of a few special types of glassware, notably fruit jars (R. 6610).

[7] Findings of fact will be abbreviated "F." Findings or parts of findings which have not been controverted by any of the appellants in their Assignments of Error will be abbreviated "U. F." In general, no further record reference will be made in support of uncontroverted findings or parts of findings. In some instances, the assignments of error list findings which are objected to only as immaterial. In other instances the assignments listing findings controvert only conclusions of law or ultimate conclusions of fact and not the specific finding. Such findings have been classified as uncontroverted. Most of the findings contain exhibit or transcript references to the evidence upon which they are based.

[8] In the suction machine process, the charges of molten glass are sucked into forming molds from a stationary or revolving pool of molten glass. In the gob feed process, a machine known as a feeder causes molten glass to be extruded in drops or gobs through an orifice and cut beyond the orifice so as to fall or slide into a forming machine which molds the glass into the desired shape. In both processes, the final step involves the conveyance of the glassware by a conveyor into a lehr or oven where it is stacked in rows by a stacker and then slowly drawn through the lehr, during which process it is annealed (i. e., gradually cooled) to render it less brittle (U. F. 27, R. 7283).

allotment of the two processes was maintained by agreement.[9]

Since 1932 the annual sales of glass containers in the United States by manufacturers have exceeded $100,000,000 (U. F. 314, R. 7345). Owens manufactured on suction machines about 27.4% of all the glass containers produced and distributed in the United States (U. F. 495, R. 7375). It also employed gob feeders (R. 6424–5, 6515; Ex. 141, R. 12,666, R. 914). With one insignificant exception, no other manufacturer used suction machines (U. F. 495, R. 7375). Hartford was the sole licensor and distributor of gob feeders in the United States (U. F. 496, R. 7376).

All but three manufacturers of glass containers[10] using automatic machinery employed feeders licensed by Hartford (U. F. 494, R. 7375). These feeders were used in the manufacture of 94% of all glass containers made by the gob feed process and of 69.2% of all glass containers made on all automatic machinery in the United States (*ibid.*). The three non-licensees produced but 3.4% of all glass containers (*ibid.*) and two of them were being sued by Hartford for infringement when the instant suit was brought (Ex. 973, R. 8423–4).

[9] Ex. 141, R. 12669; Ex. 629, R. 13280B; Ex. 631, R. 13290; Ex. 1883, R. 14436A; F. 219, R. 7325; F. 430, R. 7366. A table showing the record page on which each of the exhibits cited herein was admitted in evidence is set forth in Appendix, Section IX, pp. 437–446.

[10] Obear-Nester, F. E. Reed, and Kerr Glass Companies.

2. *Specialty ware was assigned to Corning under a division of fields with Empire and Hartford.*—Corning Glass Works (hereinafter referred to as Corning) specialized in the manufacture and distribution of incandescent lamp bulbs, signal, optical, heat-resistant, and other forms of specialty ware (U. F. 5, R. 7278). The same persons held the majority stock interest in Corning and Empire Machine Company (hereinafter referred to as Empire), which had been Corning's machine developing company. Empire owned about 43.1% of the common stock of Hartford (U. F. 6, R. 7278), and three of the individual appellants were at the same time officers or directors of Corning, Empire and Hartford (U. F. 14, 16, 17, R. 7280–1).

The Corning interests have always had power to exercise working control over Hartford (F. 56, R. 7289–90; Ex. 271, R. 12814; Ex. 1987, R. 14588) and have actively participated in the formulation of its policies and major decisions.[11]

Corning, Empire and Hartford were parties to a cross-licensing agreement dividing between Hartford and Corning the fields of glassware for which

[11] F. 56, R. 7289–90; Ex. 676, R. 13349. Corning (Br. 53) disputes this finding, quoting from Exs. 676 (R. 13348) and C–5049 (R. 14745), but F. G. Smith, of Hartford, wrote Falck, of Corning, in 1927 (Ex. 271, R. 12814): "* * * from a practical standpoint the 45% held by Empire was to all intents and purposes as good as control."

Appendix, Section X, pp. 447–53, identifies each of the individual appellants and other individuals mentioned in this brief.

the inventions of each might be licensed or employed (Ex. 19, R. 8622–9). As a result of the exclusive licenses contained in this agreement Corning occupied a monopolistic and dominating position with respect to the manufacture and distribution of heat-resistant ware (R. 2998–9).

3. *Owens, Hazel and Hartford controlled container field.*—Owens and Hazel dominated [12] the

[12] Owens (Br. 76) states: "'Domination' looms as a big word throughout the Findings of Fact and the Department of Justice's briefs." Hartford (Br. 101) states that "the defendants should not be condemned because in the course of their discussions and negotiations they use the words 'monopoly', 'control', 'dominance'. Of course they did. They hoped through the perfecting of their system to achieve lawful patent monopoly." But the quoted words were not infrequently used by the parties during the conspiracy in a strictly commercial sense. For example, H. K. Smith, in setting forth the points of agreement between Hartford and Owens in April 1922, said (Ex. 37, R. 12463):

"* * * By 'Commercial considerations' is meant the domination of outside feeders, the stabilization of the industry tending against irresponsible price-cutting; * * *"

See also Ex. 23, R. 12407; Ex. 631, R. 13290; Ex. 6, R. 12379.

"Control" in the commercial sense was used in Exhibit 395 where H. K. Smith referred to Hartford's adoption of a restricted licensing policy in order to "control" commercial glassware competition (R. 13002). See also Ex. 591, R. 13206; Ex. 885, R. 13537; Ex. 1749, R. 14232.

"Monopoly" was used in the commercial sense in Exhibit 393 (R. 12995) when H. K. Smith stated:

"The present Glassware Contract gives now (as to feeders and formers) what Corning wants; namely, Hartford's support and protection of Corning's monopolies."

* * * * *

"2. What Corning wants is that H-E should so tie up all H-E's inventions so as to protect Corning's special fields

glass-container field [14] which consisted of approximately 38 manufacturers (Owens Ans. par. 5, R. 172). Owens was the largest manufacturer and distributor of glass containers in the United States (U. F. 7, R. 7278-9) and Hazel the second largest (U. F. 9, R. 7279). In 1937 Owens manufactured approximately 38.03% and Hazel approximately 16.89% of all glass containers produced in the United States. Anchor Hocking Glass Corporation, the third largest manufacturer, produced in that year only 8.01%.[15] In 1938 Owens shipped more containers than the combined shipments of its five largest competitors.[16] Owens and Hazel together in the years 1932 through 1938 shipped 56.24% of all containers shipped by companies east of the Rockies and 78.2% of all containers shipped by companies west of the Rockies. Hazel was the largest manufacturer of wide-mouth containers (R. 1542–3) and is the recognized price leader in that field (R. 6649; F. 230, R. 7328). Owens was the recognized price leader in narrow neck ware (U. F. 127, R. 7304). Hazel was the only glass manufacturer licensed to use the suction machine inventions of Owens (U. F.

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from competition by H-E's licensees or assignees, even after the failure or expiration of the patents now covering those fields."

See also Ex. 394, R. 13001; Ex. 1399, R. 13914; cf. Ex. 677, R. 13352.

[14] F. 230, R. 7328; Ex. 1390-1, R. 12036-7; Ex. 1455, R. 12102; Ex. 1456, R. 12103, R. 6649. See footnote 4, *supra*.

[15] Hazel Ans. par. 227, R. 168-9; Owens Ans. par. 227, R. 222.

[16] Exhibit GCA-5188 (R. 8547-50); U. F. 126 (R. 7304).

477, R. 7373), but, in fact, was making no use of them (R. 2328; R. 2335).

Owens, Hazel, and Hartford were parties to a series of tripartite patent-pooling agreements entered into in 1932[17] and amended as to Owens in 1935 (U. F. 421–425, R. 7364–6), which were designed (1) to stabilize the price of glassware,[18] (2) to assure the continued dominance of Owens and Hazel,[19] (3) to prevent the rise of additional competition in the manufacture of glassware,[20] (4) to divide control of the suction machine and gob feed processes between the parties,[21] (5) to control the allocation of fields of glassware between Owens, Hazel, and other members of the industry,[22]

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[17] U. F. 212–3, R. 7323–4; U. F. 214, R. 7324; U. F. 215, R. 7324–5; U. F. 216–7, R. 7325; U. F. 218, R. 7325; F. 219–26, R. 7325–7; U. F. 227–8, R. 7327; F. 229, R. 7328; U. F. 231, R. 7328; F. 232–5, R. 7328; U. F. 236, R. 7329. See pp. 103–108, *infra*.

[18] F. 114, R. 7301 (Ex. 879, R. 13534; Ex. 23, R. 12407; Ex. 26, R. 12429; Ex. 574, R. 13182; Ex. 37, R. 12463; Ex. 1892, R. 14439; Ex. H–5843, R. 15491; Ex. 1928, R. 14493). See pp. 102–113, *infra*.

[19] F. 224–6, R. 7327; F. 229, R. 7328; U. F. 427, R. 7366; Ex. 376, R. 12943–4; Exs. 377–8, R. 12945–6; F. 428–9, R. 7366. See 102–13, *infra*.

[20] Cf. Ex. 142, sec. 7, R. 8772; Ex. 226, R. 12749; Ex. 919, R. 13574. See pp. 102–13, *infra*.

[21] F. 219, R. 7325–6 (Ex. 629, R. 13280A; Ex. 631, R. 13289; Ex. 141, R. 12662; Ex. 1883, R. 14436); F. 430, R. 1380 (Ex. 568, R. 9109); F. 431, R. 7366 (Ex. 571, R. 9126; Ex. 572, R. 9128.) See pp. 104–106, *infra*.

[22] F. 220 (R. 7326); F. 432, R. 7366–7; (Ex. 569, R. 9115; Ex. 571, R. 9126–7; Ex. 580, R. 9231).

and (6) to limit the production of other manufacturers in certain fields.[23]

4. *Lynch, Owens, and Hartford controlled forming machines.*—Lynch Corporation (hereinafter referred to as Lynch) was the largest manufacturer of feeder-fed forming machines in the United States (U. F. 11, R. 7279). It had entered into patent-pooling agreements with Owens and Hartford in 1933[24] designed to keep Lynch out of the suction machine[25] and gob feeder (F. 333, R. 7348) fields, to prevent the sale of Lynch forming machines for use with feeders not licensed by Hartford[26] and to cause non-licensees of Hartford feeders to accept such licenses.[27] Since 1933, Lynch and Hartford had furnished practically all of the narrow-neck forming machines in use in the United States (Lynch Br. pp. 9–10; cf. F. 343, R. 7350) and had experienced only negligible competition in the wide-mouth forming machine field.[28]

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[23] Ex. 928, R. 13579; Ex. 954, R. 13601; cf. Ex. 222, R. 12746; Ex. 783, R. 13459; R. 2360–1. See pp. 110–2, *infra*.

[24] U. F. 330, R. 7347; U. F. 332, R. 7348; U. F. 335, R. 7348–9 (Ex. 330, R. 9067).

[25] F. 331, R. 7347–8 (cf. Ex. 326, R. 12903; Ex. 169, R. 12692A).

[26] U. F. 335, R. 7348–9 (Ex. 330, R. 9071); U. F. 336, R. 7349 (Ex. 335, R. 12909; Ex. HA–5110, R. 14815; Ex. 535, R. 13149; F. 337, R. 7349 (R. 2194–5; R. 4032; Ex. 1111, R. 13742; Ex. 1115, R. 13745; Exs. 532–6, R. 13146–52; Ex. 1086, R. 13726; Exs. 1109–10, R. 13741; U. F. 338, R. 7349; F. 340, R. 7350).

[27] F. 339, R. 7349; Ex. 330, R. 9071; Ex. 338, R. 12911; Ex. 1077, R. 13720.

[28] F. 344, R. 7350 (R. 1624–5; R. 1869; R. 2193–4; R. 3077–8; R. 6776–8; R. 6785–7; R. 6792–3; Ex. 1217, R. 13813; Exs. 2012–13, R. 14659–60).

5. *Hartford dominated the lehr and stacker industries.*—Hartford was the predominant distributor of lehrs in the United States.[29] Hartford stackers were used with 90% of Hartford lehrs and Hartford's chief engineer testified he did not know of any other company marketing stackers (R. 4606–7).

6. *Thatcher, Owens, and Hartford controlled the milk-bottle field.*—Thatcher Manufacturing Company (hereinafter referred to as Thatcher) and Owens dominated the milk-bottle industry (F. 417, R. 7364). Thatcher was the largest manufacturer and distributor of milk bottles in the United States (U. F. 10, R. 7279) and Owens the second largest (U. F. 7, R. 7278–9). In 1937 Thatcher manufactured 36.57% and Owens approximately 35% of all glass milk bottles made in the United States.[30] The next largest competitor in that year manufactured but 6.17%.[31]

Thatcher was exclusive licensee under Hartford's milk bottle forming machine patents and used 18 of these machines to manufacture 80% of Thatcher's total milk bottle production. The production on the 18 machines constitutes one-third of all milk bottles made in the United States

[29] F. 351, R. 7352; U. F. 352–7 (R. 7352–3); F. 358, R. 7353 (R. 1875–7); F. 359, R. 7353 (R. 1878; R. 1891); U. F. 360–3, R. 7353–4; cf. R. 1879–81; R. 6775.

[30] Complaint par. 228, R. 66; Owens Ans. par. 228, R. 222–3; Thatcher Ans. par. 66, R. 139–140.

[31] Complaint par. 228, R. 66; Owens Ans. 228, R. 222–3; Thatcher Ans. 66, R. 139–40.

(U. F. 400, R. 7361). The Knox companies, which had previously been in the milk bottle business, were under agreement with Thatcher not to engage in that business for ten years from 1932 (U. F. 408, R. 7362). Hartford refused to grant or to extend licenses for the production of milk bottles, primarily for the protection of the milk bottle business of Thatcher and Owens.[22] Only Thatcher, Owens, and Liberty Glass Company enjoyed unrestricted Hartford licenses for the production of milk bottles on Hartford feeders (F. 413, R. 7363; Ex. H–5750, R. 15436–49).

7. *Ball, Owens, Hazel, and Hartford controlled the fruit-jar field.*—Appellant Ball Brothers Company (hereinafter referred to as Ball) was the largest producer of fruit jars in the United States (U. F. 12, R. 7279) and was the recognized price leader in the fruit-jar field (R. 6545). Since 1932, it had manufactured and sold more than 53% of the fruit jars produced and sold in the United States. Since 1933, it has, with Owens and Hazel, manufactured and sold more than 76% of such fruit jars; the Kerr Glass Co., which uses the older stream feeder, manufactures about 23% (U. F. 391, R. 7359). Ball, Hazel, and Owens, with Kerr, have been the only manufacturers regu-

[22] F. 412, R. 7363 (Ex. 235, R. 12758B; Ex. 232, R. 12760A; Ex. 239, R. 12761; Ex. 738, R. 13433; Ex. 1247, R. 13828; Ex. 444, R. 13065; Ex. 471, R. 13090; Ex. 1363, R. 13936; Ex. 1818, R. 14349; Ex. 435, R. 13059; Exs. 445–8, R. 13066A–9; Ex. 1248, R. 13829; Ex. 482, R. 13099; Exs. 463–4, R. 13082–3; R. 2670–1; R. 3156; R. 1240–1; R. 1311–12).

larly engaged in the production and sale of fruit jars since 1933 (U. F. 391, R. 7359). The Knox companies (U. F. 377, R. 7356; R. 1536–7; Ex. 195, R. 8873) and Brockway Machine Bottle Company (U. F. 379, R. 7357) were under agreement with Ball not to manufacture fruit jars for 15 years from 1933. Ball, Owens, Hazel, and Hartford were operating under an oral understanding that Owens would not produce more than 100,000 gross and Hazel not more than 300,000 gross of fruit jars per year except (in the case of Hazel) in any year when the demand was unusually large.[33]

Hartford had a license agreement with Ball in which Hartford agreed not to grant during the life of the agreement any other feeder license for the manufacture of fruit jars in the continental United States (U. F. 385, R. 7358).

8. *Owens, Hazel, Hartford, Lynch, Ball, and Thatcher were combined with others in the Association to stabilize the market for glassware.*— Since 1933 the membership of the Glass Container Association (hereinafter referred to as the Association) comprised manufacturers of 96% of the glass containers produced in the United States (R. 3469). Each of the appellants Owens, Hazel, Hartford, Lynch, Ball, and Thatcher had been, at least since 1933, a member of the Association (U. F. 13, R. 7280). The statistical com-

[33] F. 383, R. 7358 (R. 2154–6; cf. R. 2142; Ex. 173, R. 12698; Ex. 191, R. 12717).

mittee of the Association consisted of five members, all of whom were defendants.[24] They included representatives of Owens, Hazel, Ball, and Thatcher.[25] Through this committee, the Association compiled and circulated among its members monthly production reports,[26] which were sent out pursuant to a policy that the available business "should be divided among members in the industry on some kind of equitable basis" (R. 3505; F. 498, R. 7376). These reports were compiled from statistics submitted by practically every member of the Association[27] and were frequently referred to as "quotas."[28] They served as the basis for the application of moral sanctions for the purpose of limiting production.[29]

[24] The Committee for 1939–1940 consisted of appellants G. A. Ball (of Ball), I. J. Collins (of Anchor Hocking and a former director of Hartford), W. E. Levis (of Owens), H. C. Mandeville (who has died since he took an appeal to this Court) (of Thatcher), and J. H. McNash (of Hazel). Prior thereto the Committee had 7 members, and for the four years prior to 1939 it included, in addition to the above members, defendant G. F. Rieman, who has not appealed, and another person (Ex. 1714, R. 14138).

[25] F. 497, R. 7376 (Ex. 1714, R. 14137; Ex. GCA–5188, R. 8543).

[26] R. 3566; R. 3506; cf. R. 3709–10.

[27] F. 499, R. 7376 (R. 3526–9; Exs. 1390–1483, R. 12036–12130).

[28] F. 500, R. 7376 (Ex. 1340, R. 13917; Ex. 261, R. 12809; Ex. 809, R. 13478; Ex. 810, R. 13479; Ex. 811, R. 13480; Ex. 798, R. 13468).

[29] Ex. 1504, R. 13999; Ex. GCA–5295, R. 14971; Ex. 667, R. 13335; Ex. 1761, R. 14247; Ex. 432, R. 13054–5; Ex. 261, R. 12809; Ex. 809, R. 13478; Ex. 811, R. 13480; Ex. 1306, R. 13897; Ex. 419, R. 13038; F. 503, R. 7377.

9. *Extent and effect of the patent pool.*— Through cross-licensing agreements, joint control had been established over a patent pool in the gob feed field, which included nearly 650 Hartford patents (Ex. 973, R. 7984–8034; F. 486, R. 7374), 129 patents of the Corning interests (Ex. 16, Sched. D, R. 11989; F. 486, R. 7374), over 65 Owens patents (F. 486, R. 7374), 73 Hazel patents (Ex. HA–5076B, R. 9897–99; F. 486, R. 7374), and at least 12 Lynch patents (Ex. 330, R. 9082; F. 486, R. 7374). In addition, Ball had in substance given Hartford the refusal of all of Ball's feeder and former patents (U. F. 385, R. 7358), and Thatcher, Owens, Corning, Hazel, and Ball, as well as the other licensees of Hartford, had agreed to license or to assign to Hartford all of their improvement patents in the gob feeder field (see e. g., Ex. 1624, sec. 8, R. 9372).

Similarly, through cross-licensing agreements, Owens, Hartford, and Hazel had pooled their suction patents. In addition, Lynch had given Owens an exclusive license on all suction inventions (U. F. 330, R. 7347).

Over 94% of the glass containers manufactured on feeders and forming machines in the United States were made on machines licensed under the pooled patents (Ex. 1367, R. 13944A).[40]

[40] Only the machines of Kerr Glass Company, which were stream feeders, were free from attack (R. 3293–4).

The district court found (F. 493, R. 7375) (1) that invention in glass-making machinery had been discouraged and suppressed by the removal of competition in its development (cf. R. 5688); (2) that Corning and Owens ceased all development work on feeders as a result of their agreements with Hartford (R. 5174–5; Ex. 629, R. 13280B); and (3) that the acquisition by Hartford and Owens of various competing machines ended development work by the original producers thereof.

10. *The Hartford leasing system.*—Hartford had never sold its machines, but had always leased them to manufacturers of unpatented glassware as patent licensees for a term of eight years, with an option in the license to renew for a subsequent term of the same length (F. 447, R. 7368; Ex. 395, R. 13002). At the end of 1941 there were some 640 feeders of various makes owned by Hartford and under lease to its licensees. Hartford then had title to 18 milk bottle forming machines, 176 individual section forming machines and 8 other forming machines—all of which were in the possession of its licensees. Hartford then also had title to 362 Hartford lehrs and 198 other lehrs and 322 stackers which were leased to its licensees (U. F. 449, R. 7369). Except for the Hazel and Ball feeders and some 24 feeders held by Capstan Glass Company, all of which were under Hartford license, Hartford had title to all of the feeders

used by its licensees (U. F. 448, R. 7369), regardless of whether such feeders had been originally owned by Hartford or by the licensees (U. F. 449, R. 7369).

Hartford had issued no license for the manufacture of unpatented glassware without a restriction as to the type of ware which could be produced (U. F. 472, R. 7372). Many of its licenses contained additional kinds of restrictions.[41] Since 1917 it had been the policy of Hartford to license only concerns previously in the industry,[42] and since 1925 Hartford had discouraged or refused to license at least 30 applicants.[43] Virtually all newcomers, including companies using glass products, had been excluded through the licensing policy of Hartford and Owens.[44]

11. *Royalty rates and excessive profits.*—Since 1932 or 1933, Hartford had burdened the industry and the purchasing public with royalty rates in excess of those required to pay all its expenses and to provide it with a reasonable return upon

[41] F. 455, R. 7370; F. 473, R. 7372; Ex. H–5750, R. 15436. These related to territory, number of machines, and quantity of glassware.

[42] F. 453, R. 7370; Ex. 395, R. 13001; Ex. 710, R. 13412; Ex. 597, R. 13210.

[43] Appendix, Section I, pp. 416–417.

[44] U. F. 477, R. 7373; U. F. 494, R. 7375; U. F. 496, R. 7376; F. 450, R. 7369 (Ex. 395, R. 13002); F. 453, R. 7370 (Ex. 710, R. 13412; Ex. 597, R. 13210); F. 454, R. 7370.

informed Ball (Ex. 181, R. 12707) that Hartford was—

> continually declining new business in the belief that an association with your Company would be more beneficial to us than to take our fruit jar rights and license a number of concerns. The easiest thing we could do would be to license Kerr, Brockway, Underwood [Knox], Monaca, and five or six more concerns in the East and South, as well as on the Coast * * *.
>
> On the other hand, it seems rather a pity to disrupt the existing general fruit jar situation which, barring a few soft points, is pretty well in hand and affords a reasonable margin of profit [cf. U. F. 372, R. 7355].

(*c*) *Elimination or restriction of actual or potential competitors of Ball.*—In February 1933, Hartford had outstanding the following fruit jar rights: (1) unlimited, to General Glass; (2) a license limited to 120,000 gross annually, to Gayner, which was to expire July 1, 1934; (3) a license limited to a highly specialized type of fruit jar, to Salem;[36] (4) unlimited, to Hazel; and (5) unlimited, to Owens (U. F. 373, R. 7355). Brockway and Knox, though not licensed by Hartford to make fruit jars, continued to do so on unlicensed equipment (U. F. 374, R. 7356).

[36] There is no indication that Salem manufactured fruit jars under this license. Though a member of the Association (Ex. GCA–5188, R. 8564–5), Salem's production is not included in the Association's fruit jar statistics (Exs. 1390–1485, R. 12036–132).

Smith told Ball that Hartford would buy back General's fruit jar rights (R. 3041–2; Ex. 177, R. 12703). Levis testified that in the preceding summer he and McNash had told appellant I. J. Collins, president of General and also a director of Hartford (U. F. 617, R. 7399), that he "ought to give up his license" and that Collins agreed (R. 2147; F. 375, R. 7356).[27]

On October 10, 1932, Smith wrote I. J. Collins (Ex. 178, R. 12704):

> In talking with Will Levis this morning about the situation he told me that he was going to take the matter up with you by telephone as he felt it was most necessary that Ball Bros. become a licensee and that it would be suicidal to put up any barriers which would mean that Ball Bros. were on the outside and had to be dealt with in an unfriendly rather than in a co-operative and friendly way.

On March 23, 1933, General surrendered its fruit jar rights for $100,000 (Ex. 198, R. 8876; F. 375, R. 7356).

Hartford assured Ball that it would not in the future license Knox to manufacture fruit jars (U. F. 376, R. 7356); and about March 1, 1933,

[27] Collins denied this (R. 2976), but Levis is corroborated by Smith's letter to Collins of October 10, 1932, with copies to McNash and Levis, in which Smith also urged Collins to forget his technical rights in deference to "the commercial considerations for the policies which we are trying to carry out" (Ex. 178, R. 12705).

Hartford, Ball, and Knox entered into an informal agreement (U. F. 377, R. 7356) as a result of which on March 23, 1933, Ball and Knox agreed that in exchange for $112,000, Knox and its president would not engage in the manufacture or sale of fruit jars in the United States for 15 years, but would transfer to Ball Knox's inventory of fruit jars and certain equipment pertaining to their manufacture (U. F. 377, R. 7356). Hartford in turn canceled $44,000 in notes payable to it by Knox (*ibid*).[25]

Negotiations looking toward the acceptance of a Hartford feeder license by Ball and Brockway were concurrent (U. F. 378, R. 7356). Early in January 1933, Brockway asked Hartford for the right to manufacture fruit jars but (R. 3163, 3165):

[25] Ball states (br. p. 41) that "there is nothing in the record which indicates that Ball Brothers had anything to do with Hartford's acquiescence in Underwood's demand" that Hartford cancel part of Knox's indebtedness to Hartford, in exchange for Knox's sale of its fruit jar business to Ball. But Ball ignores the following testimony of Underwood (R. 1537) regarding a conference at New York attended by F. C. and G. A. Ball and Hornbrook (Ball's attorney):

"* * * I advised them that the only proposition that Knox would be interested in, and would surrender their right to manufacture fruit jars on the Knox-O'Neill Vacuum machine, would be for the Ball people to pay the Knox group not less than $100,000 for the business; * * * and that Hartford-Empire would be required to surrender, or to credit the Knox account, or to cancel at least, $44,000 of obligations of the August, 1932, note obligations.

"At that point * * * Goodwin Smith entered the conference. * * * Without much more ceremony, Mr. Hornbrook drafted a letter setting forth the fact that these things would be done and the deal concluded."

> Hartford was absolutely obdurate * * * the explanation being made * * * that fruit jars were being reserved for Ball Brothers * * * [Cf. Ex. 1184, R. 13799].

On April 27, 1933, Brockway sold to Ball its trade-marks, patent applications, and molds relating to fruit jars for approximately $54,000 and its inventory of fruit jars for an additional $94,000 and, with its president, agreed to stay out of the fruit jar business in continental United States, except Alaska and New Mexico, for fifteen years (U. F. 379, R. 7357).

On May 11, 1933, Gayner, for $30,000, sold its fruit jar business to Ball and agreed not to manufacture fruit jars until July 1, 1934, after which date it had no Hartford license to do so (U. F. 380, R. 7357).

These transactions took out of the field all Ball's competitors except Owens, Hazel, Kerr (U. F. 391, R. 7359) (a user of stream rather than gob feeders), and possibly Three Rivers.

(*d*) *Hazel and Owens agreed to restrict their production.*—On January 26, 1933, Hartford prepared a proposed amendment to Owens' license restricting Owens to the production of 100,000 gross of fruit jars per year (R. 4019–20; Ex. 1743, R. 9509A). It was understood that a similar agreement amending the Hazel license by restricting Hazel's production to 300,000 gross per year (R. 2424), would be drawn if and when the Owens' amendment was worked out (R. 4020).

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Carter wrote C. B. Belknap on February 1, 1933, criticising the draft (Ex. 189, R. 12713):

> * * * we see no reason why there should be any amendment of our General License Agreement with Hartford, believing it would be more advisable to simply have a side agreement by which O–I agrees to limit its fruit jar production under its Hartford license "if and when and so long as" the above mentioned conditions exist.
>
> Naturally, perhaps, this will raise the question as to whether the limitation so expressed would not be in contravention of the anti-trust statutes, but on this point, Mr. Naylor [of the legal department of Owens] suggests that the proposed side agreement make no mention of Ball Brothers * * *

Representatives of Hartford, Owens, Hazel and Ball attended a conference on February 2–4, 1933 (R. 4020–21), at which McNash of Hazel prepared a memorandum in part as follows (Ex. 191, R. 12718):

> I was willing to * * * restrict our license to 300,000 gross per year, without any mention in the contract of any conditions modifying this amount.
>
> Previous to this I had been insisting upon some understanding in event of an increase in the use of fruit jars for the domestic trade; * * *
>
> I told Mr. F. C. and G. A. Ball it was not necessary to have these modifications

in the contract as far as I was concerned, if they * * * would permit me to tell my story to Mr. F. Goodwin Smith in their presence, inasmuch as he would have to be the umpire under the licensing arrangement, and for them to see whether my statement was correct or not.

* * * * *

Messrs. F. C. and G. A. Ball confirmed my understanding in Mr. F. Goodwin Smith's presence * * *[20]

Between February 20 and March 1, the parties decided not to amend the existing written license agreements between Hartford and Owens and Hartford and Hazel because Ball's counsel believed this would violate the antitrust laws.[20]

The parties all denied on the witness stand the existence of any oral agreement to restrict the fruit jar production of Hazel and Owens.[21] Levis, nevertheless, testified without objection that in 1938 F. C. Ball had stated before the TNEC that Ball Brothers had an understanding with Owens that Owens was not to manufacture more than 100,000 gross of fruit jars in any year after 1932

[20] On February 14, Brown wrote to Ball's counsel (Ex. 1746, R. 14227): "I believe that the Hartford Company is entirely justified in * * * agreeing with the Owens and Hazel companies that those companies will accept a restriction upon their domestic fruit jar rights."

[20] F. 382, R. 7357 (R. 3044; R. 4052–3; Ex. 1745, R. 14223–4).

[21] F. C. Ball (R. 4271–2); G. A. Ball (R. 3044–5); F. G. Smith (R. 1007–8); R. D. Brown (R. 4052–3); W. E. Levis (R. 2154–5); J. H. McNash (R. 2426).

or 1933 (R. 2155). McNash also testified without objection that F. C. Ball "probably" stated before the TNEC that Ball had an understanding with Hazel that Hazel was not to manufacture more than 300,000 gross of fruit jars in any year after 1932 or 1933, except in a year of unusual demand (R. 2427). McNash further testified that Hazel "accepted a restriction that did not restrict, that never was converted into a contract or an understanding" (R. 2437), and that he "was under the impression at the time of the TNEC investigation there had been a contract, but I was wrong" (R. 2441). Hazel, in fact, never shipped more than 300,000 gross of fruit jars annually after 1932; and Owens never shipped more than 100,000 gross in any year after 1932, except in 1935 when it shipped 103,100 gross (U. F. 384, R. 7358).

The District Court, discrediting the denials of the parties,[21a] found (F. 383, R. 7358) that Owens, Hazel, Hartford, and Ball did arrive at an oral understanding so restricting the production of Hazel and Owens.[22]

[21a] The district court stated (Op. R. 17):

"The reticence of some of the key witnesses to disclose what plainly was within their knowledge as principal actors in the main conferences that occurred over a period of time, and that resulted in the consummation of important agreements, was of such a pronounced character as to discount substantially the weight of their testimony, and their credibility, in the eyes of the court."

[22] R. 2155; R. 2427; R. 2142; Ex. 173, R. 12698; cf. U. F. 384, R. 7358; Ex. 191, R. 12717.

(*e*) *The Hartford-Ball Agreement.*—On March 25, 1933, Ball accepted a feeder license from Hartford under which it paid $150,000 alleged infringement damages and gave Hartford an option to purchase any of its feeders or patents relating to feeders which it might be willing to sell or license to others. In exchange for an additional $250,000, Hartford agreed, for the life of the agreement, not to grant any other feeder license for the manufacture of fruit jars in continental United States (U. F. 385, R. 7358). The license specifically excluded the Corning field, milk bottles, and other specified ware items (U. F. 386, R. 7358).

Ball continued to use its own feeders (R. 6602, R. 6613) and until 1941 had never commercially used a Hartford feeder or forming machine (U. F. 387, R. 7359).

The District Court found that Ball accepted the Hartford license and entered into the contracts with Knox, Brockway, and Gayner because it desired to limit and restrict the production of fruit jars by excluding from this field manufacturers other than Hazel and Owens, on whose sales it had secured limitations (F. 388, R. 7359).

(*f*) *Enforcement of restrictions and extension thereof to packers' ware.*—Following the execution of the agreement with Hartford, Ball demanded and received rigid enforcement of its residual exclusive license.[33] Hartford amended its standard

[33] F. 392, R. 7360 (R. 3275–6; Exs. 201–204, R. 12723–9; Exs. 210–213; R. 12740B–2A; Exs. 1164–66, R. 13784A–6; Ex. 1193, R. 13801; Ex. 1315, R. 13902A; Ex. 1318, R. 13905).

form of feeder license to include in the list of excluded ware items the definition of fruit jars contained in the agreement with Ball (e. g., Ex. 1624, Sched. C, R. 9384); but this definition did not include as a fruit jar, "jars manufactured for packers to be filled by them before selling to their trade" (Ex. 199, Art. II, sec. 1 (a), R. 8880). At the suggestion of F. C. Ball (Ex. 204, R. 12728), however, Hartford went beyond the definition of fruit jars contained in its agreement with Ball and prohibited several others of its licensees from manufacturing any kind of glass container capable of being sealed with a closure which was also capable of sealing fruit jars,[84] and prohibited one licensee from manufacturing packers' ware "capable of receiving a Mason fruit jar cap" unless the manufacture thereof was pursuant to a "direct order" from a packer (Ex. 789, Sched. A, R. 9247; F. 393, R. 7360). It repeatedly refused to license others to make fruit jars in order to protect Ball, Owens, and Hazel.[85]

(*g*) *Ball acquired competing Three Rivers Glass Company.*—From at least May 1933 until 1935, Three Rivers Glass Company in Texas was selling packers' ware designed to be sold empty to the domestic preserving trade in competition with Ball and at prices substantially below those at

[84] F. 393, R. 7360 (Ex. 1620, Sched. C, R. 9363; Ex. 1800, R. 14314).

[85] F. 392, R. 7360; Appendix, Sections I and II, pp. 416–420.

which Ball offered to sell its jars (U. F. 389, R. 7359). Ball frequently complained to Hartford of this,[36] since Hartford's license to Three Rivers permitted the manufacture of packers' ware but not fruit jars (Ex. H–5750, R. 15441).

The District Court found (F. 390, R. 7359) that, after conversations with representatives of Hartford (Ex. H–5742, R. 15428) and with their cooperation and approval,[37] Ball acquired the factory of Three Rivers for approximately $130,000 (Ex. H–5745, R. 15432A); and that the plant was operated for only about one year thereafter (R. 3062).

9. *The role of the Association in the conspiracy*

The Association was organized as a trade association in 1919 (Ex. 1716, R. 14143). Prior to 1933 its members manufactured 82% of the glass containers made in the United States and since then have manufactured 96%.[38]

In 1925 a statistical committee was formed and, with the exception of the period from October 1933 to May 1935, continued to function to the

[36] E. g., Exs. 201–2, R. 12723–4.

[37] R. 3058–9; Ex. H–5741, R. 15424; Ex. H–5742, R. 15427.

[38] R. 3469. Hartford and Lynch, though not glass container manufacturers, have enjoyed membership in the Association on the same basis as other members, according to the by-laws (Ex. 1716, R. 14150–1), and the testimony of the Association's assistant manager (R. 3468). F. G. Smith (R. 1283) and Pease (R. 3290), of Hartford, nevertheless, testified that Hartford had no right to vote.

time of the trial (Ex. 1714, R. 14137–8; F. 497, R. 7376). During the period of its operation in the years 1931 through 1937, that committee consisted of seven members, including representatives of Owens, Hazel, Anchor Hocking and Thatcher (*ibid.*). Ball has been represented from 1933 to date (*ibid.*). The appellants were likewise heavily represented on the board of directors (Ex. 1713, R. 14135–7).

In January 1930, Thatcher, Hartford, Owens, and Hazel, acting with the aid of the Association, engaged in a united but unsuccessful attempt to discourage Knox from increasing its capacity to produce glass containers.[39]

The Association has cooperated with Hartford to keep newcomers out of the industry and with Hartford has frequently been successful in this effort.[40] It has occasionally attempted "to color" the "facts" in replies to persons seeking to enter the industry in such a way that "they might be discouraged" (R. 3478).

When appellant Stevenson became business manager of the Association in June 1928, it

[39] F. 507, R. 7377 (Ex. 630, R. 13285; Exs. 1841–2, R. 1437A–1; Exs. 907–8, R. 13566–7). (See *supra*, pp. 122–3.)

[40] F. 508, R. 7377; R. 3487–8; R. 3492–96; Ex. 1377, R. 13954; Exs. 476–7, R. 13094–5; Exs. 503–4, R. 13114C–D; Exs. 509–10, R. 13120A–1.

F. G. Smith wrote the president of Reed Glass Company in 1933 (Ex. 710, R. 13412):

"We have every reason to believe that our best interests lie with those glass manufacturers who have been in business and who are members of the Glass Container Association."

adopted a policy of market sharing,[41] designated as the Stevenson principle of "live and let live." Enforcement of this policy became a function of the Association (R. 3506–7) and was described by appellant Ackerman, the assistant manager, as follows:

> I have heard Mr. Stevenson announce many times his theory of "live and let live," and that there was only so much business to be secured in the industry, and that should be divided among members in the industry on some kind of equitable basis, if they could all stay in the industry and exist. [R. 3505.]

The Stevenson policy was also explained by the witness Hartley, a member of the statistical committee from 1928 to December 1930 (Ex. 1714, R. 14137–8), as follows (R. 3709):

> Q. * * * did Mr. Stevenson announce his theories as to how to take care of the situation?
>
> A. That was almost the opening prayer.
>
> Q. He was known for that?
>
> A. Yes, he was.
>
> Q. Tell us what he said, to use your expression, what his prayer usually was?
>
> A. Well, he said the thing that restricted us is the Clayton Act and the Anti-Trust Laws, and he said, of course, the Clayton Act is a wrong law * * *

[41] F. 498, R. 7376 (R. 3566; R. 3506–7; R. 3709).

Q. Did he tell you how he was going to take care of this over-production and low prices?

A. Yes. He said he was going to shut down factories and get the balance between capacity and demand.

Monthly production reports from members of the Association were designed to limit production by members, through the threat of exposure of any deviation from "quotas" with resultant criticism,[42] and thus to stabilize the production and distribution of glass containers (F. 504, R. 7377). Until July 1939, the reports set forth both the past and future expected production of the member to whom they were sent (Exs. 600–6, R. 13211–17; F. 499, R. 7376). These forecasts were regarded as, and had the effect of, quotas, to which members were expected to conform (F. 500, R. 7376; F. 503, R. 7377).

In July 1939, the Association substituted for the forecast figures a record of the total shipments of the industry for each of the preceding five years compared with the shipments of the company to which the report was sent. The amended report included the percentage of the total industry shipments shipped by such company during each of the five years (see Ex. 607, R. 13218; F. 506, R. 7377).

[42] Ex. 1504 (R. 13999); Ex. GCA–5295 (R. 14971); Ex. 667 (R. 13335); Ex. 1761 (R. 14248); Ex. 432 (R. 13054); Ex. 809 (R. 13478); Ex. 811 (R. 13480); Ex. 1306 (R. 13897; 3267); F. 503 (R. 7377).

It was the regular practice from 1931 to 1939 for members of the statistical committee to reveal their forecasts to one another and it was the policy of the Association to make them available to other members upon specific consent of the member whose report was involved (R. 3578; F. 502, R. 7376). Forecasts were frequently exchanged at Association meetings (R. 2014–15).

The effectiveness of this system is illustrated by the following memorandum written by defendant G. F. Rieman, a defendant not appealing, a member of the statistical committee and an officer of Capstan Glass Company (U. F. 626; R. 7400), with respect to a proposed acquisition of the Diamond Glass Company. The memorandum was dated some two months after the invalidation of the N. R. A. codes [48]:

> The main thing we would be buying would be quota. The six major concerns control about 74% of the industry and since the quota system was in operation years before N. R. A. and since at the past meeting all of the major concerns were still in favor of maintaining it, it seems likely it will continue. However, before doing anything definite at Diamond we would of

[48] F. 501, R. 7376; (R. 3577–9; Ex. 918, R. 13573–4). A Code under NRA for the glass container industry was approved on October 3, 1933, and it contained provisions for the establishment, subject to the approval of the Administrator, of a quota system (Ex. G. C. A. 5189, Sched. A, R. 14875–6). This approval was never obtained (Asso. Br. 16).

course make sure the major concerns would guarantee this quota to us if we buy the plant and dismantle it. Their quota amounts to 0.7% (as compared to Capstan-Salem 6.0%) and would be about $600,000.[44]

In addition to the general quota system the West Coast members of the Association allocated particular orders.[45]

10. *Creation and use of the patent pool*

The parties deliberately set out, through acquisitions and cross-license agreements, to create the structure which subjected the patents of Hartford, Empire, Corning, Owens, Hazel, Lynch and many others to the Hartford licensing system.[46]

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[44] Ex. 811 (R. 13480–1). See also U. F. 626, R. 7400; Ex. 432, R. 13054; Ex. 667, R. 13335; Ex. 793, R. 13468; Exs. 809–10, R. 13478–80; Ex. 1504, R. 13999; Ex. GCA–5295, R. 14971.

[45] R. 3992–2; R. 3998–9; Ex. 1306, R. 13897. It was because of the suspicious nature of the percentage forecasts that Armstrong Cork Company resigned its membership in the Association in May or June 1939, five or six months after the TNEC had investigated the glassware industry (F. 506, R. 7377; R. 3529; R. 3574–5).

[46] In the negotiations leading up to the 1924 agreement, the vice president of Owens wrote (Ex. 889, R. 13545):
"We are foregoing all present gain in the hope that a concentration of patents in the hands of Hartford-Fairmont Company will enable them to control the feeder situation."
The plan to use the aggregation of patents unitedly for restraining competition was dubbed at a conference of counsel of Hartford and Owens in December 1925 (Ex. 1732, R. 14206):
"* * * the mosaic theory, according to which as many patents as possible will be treated as a group."
Owens later wrote to Hartford (Ex. 109, R. 12592):

Hartford acquired from others than its own employees at least 317 patents and applications (Ex. H–6103, R. 11046).[47] It appears from Exhibit H–6100 (R. 11041–5) that the appellants employed 49 different patents in actual litigation (U. F. 488, R. 7374), upon which Hartford brought 26 infringement suits (Ex. 973, R. 8023–6), and Owens

"* * * the constructive policy would be to add to your line every patent which by any reasonable possibility might be expected to have a value (offensive or defensive) commensurate with its cost, and of which the lawyers would O. K. the purchase."

[47] Among the more important patents acquired or controlled by Hartford were the Steimer, Hitchcock, Howard, Lott, T. R. & B., Nivison-Weiskopf, Miller, Rankin, O'Neill, and Headley & Thompson patents. The Steimer application acquired jointly by Hartford and Empire matured ultimately into ten separate patents (Ex. H–5926, R. 11,000).

Hartford (Br. 101) states that the record shows many patents relating to feeders, forming machines, and lehrs, which are not owned by Hartford and under which Hartford is not even licensed. Exhibit 1576 (R. 8043–7) is cited without pointing out that in 1933 Hartford obtained an option from Ball (Ex. 199, R. 8879) to acquire any of the feeder patents owned by Ball if Ball should desire to dispose of or grant licenses under them. Reference is also made to Ex. 1569 (Fol. 15395) which shows that Anchor Hocking owns a few feeder, former, and lehr patents. But under the Hartford standard licenses to Anchor Hocking with respect to feeders (Ex. H–5793, R. 9675; Ex. H–5782, R. 9655, 9659–60), formers (Ex. H–5794, Fol. 20329), and lehrs (Ex. H–5795, R. 9678), Anchor Hocking is required to give Hartford a license under all patents representing a substantial improvement on the Hartford feeders, formers, and lehrs. Hartford also cites Ex. 946 (R. 7956–63), which lists the Hazel lehr and stacker patents, but these patents are few in number. Hartford, of course, was licensed under all of Hazel's feeder and former patents (Ex. 142, Secs. 1, 5, R. 8766, 8770).

brought 4 (Ex. 1595, R. 8188). Of these 49 patents, 24 were acquired patents and 25 were patents of Hartford inventors (U. F. 488, R. 7374). Hartford brought suit on 4.6% of the patents of its own inventors and on 7.6% of its acquired patents (U. F. 489, R. 7375).

The patents in the pool were used for bringing under license 441 feeders, formers, and suction machines of 20 different makes (Ex. H–5749, R. 15435). 220 of these patents were listed on plates attached to licensed machines (Ex. H–6106, R. 11100); and of these 220, 73 were acquired patents (cf. Ex. H–6106, R. 11100 with Ex. 973, R. 7986).[46]

11. *The Hartford leasing system*

(*a*) *Growth and objectives.*—The development of the Hartford leasing system has already been partially described. The evidence shows and the district court found (1) that Hartford and its predecessor have at all times since 1917 planned their licensing policy so as artificially to

[46] The record shows that Hartford alone has paid out at least $24,904,598 to secure and maintain its patent control. Of this amount, $3,696,586 was paid directly for the acquisition of patents, $9,375,094 was paid for the cooperation of Owens, and $11,832,918 was paid for the cooperation of Hazel. These figures do not include $4,500,000 paid in dividends on Empire stock, $371,418 preferred stock dividends paid to Howard stockholders, and joint patent litigation and similar expenses shared with Owens. (See Appendix, Section VI, pp. 427–428.)

restrict the production of glassware [48a] and to exclude newcomers from the industry in order to achieve stabilization, particularly of glassware prices; [49] (2) that at least from the time of its 1924 contract with Owens, Hartford's licensing policy was based on a "principle of not favoring any over-investment in plant, tending to overproduction"; [50] and of guarding against the "danger of price-cutting" by manufacturers of glassware; [51] (3) that this policy has been implemented by licensing each licensee to manufacture only specified articles and by licensing only select manufacturers; [52] (4) that in granting licenses initially to manufacturers who had theretofore been in the industry, Hartford's policy was to license them only to manufacture the types of ware which they had previously been making (F. 455, R. 7370; R. 3242–3); (5) that Hartford's policy of retaining title to its machines was

[48a] Hartford argues (Br. 62) that it "issued so many licenses that there has been chronic overcapacity in the industry." It does not show that the demand would not have exceeded the capacity if competition had been permitted to reduce prices, and to free them from the "stabilizing" effects (cf. Hartford Br. 113) of the restrictions in the licensing system and the quotas of the Association.

[49] F. 450, R. 7369 (Ex. 395, R. 13002; for quotation from Ex. 395, see pp. 22–24, *supra*); Ex. 1363, R. 13935; Ex. 710, R. 13412; Ex. 165, R. 12682; Ex. 1772, R. 14261.

[50] F. 451, R. 7369 (Ex. 1950, R. 14523).

[51] F. 451, R. 7369 (Ex. 32, R. 12450, R. 4685).

[52] F. 451, R. 7369 (Ex. 395, R. 13002); F. 471, R. 7372; Ex. H–5750, R. 15436.

adopted to permit it to enforce the restrictive provisions in order to prevent too much competition among its licensees (F. 447, R. 7368; Ex. 395, R. 13002), and that this policy extended to the obtaining of title to machinery which had been owned by the licensees before being put under license by Hartford (F. 447, R. 7368).

It is clear that this policy grew out of something more than a desire to secure royalty payments. When Capstan asked for a reduction in royalties in 1930, Hartford replied (Ex. 1861, R. 14396) that this would necessitate a reduction to all its licensees and

> * * * that if we were forced to any such action we would then be compelled to go into a straight policy of machine sales to all who want machines, which would result in chaos in the industry * * *.

After the 1924 contract with Owens, and at Owens' request,[53] Hartford adopted the policy of generally refusing to license concerns which intended to use the bottles which they made to contain products which they themselves manufactured or packed (R. 3255).

Hartford denies that its licensing policy was molded or influenced in any way by Owens or other powerful licensees and asserts that its licensing policy was adopted in 1914 long before contact with the other defendants (Br. 17, 53, 110–

[53] F. 452, R. 7369 (Ex. 52, R. 12526; Ex. 885, R. 13538).

11). A Peiler memorandum introduced by Hartford dated July 15, 1914, states (Ex. H–5347, R. 15043) that Hartford

> * * * had not yet decided on what basis to operate or lease these feeders, that we preferred to charge a royalty, and that we were not yet in a position to supply feeders to outsiders anyway. * * *

Except for Empire, Hartford had no licensees until November 1916 (Ex. H–5750, R. 15436). H. K. Smith definitely stated that Hartford's licensing policy was formulated in 1917 (Ex. 395, R. 13002; cf. F. 450, R. 7369). This was after contact with Empire and Corning.

The findings of the district court show that this policy was modified where necessary to meet the demands of Owens.[14] H. K. Smith recognized that the Hartford policy was shaken by the necessities arising out of the conflict with Owens. In 1921, he pointed out to the Owens representatives (Ex. 25, R. 12418):

> * * * that it was well to recognize frankly the existence of the real conflict of interest between a concern manufacturing glass and taking licenses of machinery for such purpose; and a concern engaged mainly in developing such machinery and granting

[14] F. 451–2, R. 7369; Ex. 1950, R. 14523; Ex. 32, R. 12450; Ex. 52, R. 12526; Ex. 885, R. 13538. Hartford admits that Section 22 in its 1924 agreement with Owens "required" Hartford "to get Owens' consent to the issue by Hartford of new licenses" under Owens' patents (Hartford Br., p. 63).

licenses thereon—the manufacturer in such case would naturally desire to minimize the number of licenses granted by the licensing company to his competitors, while the licensing company itself would naturally desire to grant as many licenses as possible (without seriously unstabilizing the trade) so as to increase its income.

Owens' clear intent was "to force a stable price policy" (Ex. 26, R. 12429), and Hartford thoroughly concurred in this purpose and cooperated to this end, recognizing that restrictions should be placed so as to avoid "over-plant investment or danger of price-cutting" (Ex. 32, R. 12450.[55]

(*b*) *Licensees required to acknowledge validity of patents.*—In the standard license granted prior to August 1932, Hartford's licensees were required to acknowledge the validity of all of Hartford's existing and future patents issued during the term of the license and relating to the licensed machinery (U. F. 475, R. 7373; see e. g., Ex. 1625, sec. 15, R. 9394). Many licensees who accepted standard licenses prior to 1932 were re-

[55] In discussing the proposed combination between Hartford and Owens, Dorsey wrote Falck in 1921 (Ex. 679, R. 13356): "* * * the prospective deal will contemplate some restriction on putting out new feeders and tend to stabilize the industrial glass trade conditions, all present licensees of the Hartford Co. being protected. Corning is to be considered as one of these present licensees."

quired until 1941 to acknowledge the validity of Hartford's future patents.[56]

In the July 1, 1932, agreements between Hartford and Hazel, Hartford and Owens, and Owens and Hazel, each party acknowledged the validity and broad scope of all existing and future licensed inventions of the other party (U. F. 476, R. 7373).

(*c*) *Restrictions designed to limit the markets of licensee glassware manufacturers.*—In addition to the customary forms of restrictions already discussed (*supra*, pp. 165–166), some Hatrford licenses permitted sale of the glassware made thereunder only to specified customers.[57] One licensee (Northwestern) was prohibited from distributing ware outside a stated territory (Ex. H–5750, R. 15443). No licensee, of course, could use more than the number of feeders which Hartford saw fit to lease to it; and Knox was not even permitted to use all of the feeders leased to it.[58]

The "determining factor" with respect to the articles which a licensee was permitted to make under a license for any specified ware type was

[56] U. F. 475, R. 7373; e. g., Ex. 1613, sec. 15, R. 9348; Ex. 1614, sec. 15, R. 9348; Ex. 1621, sec. 15, R. 9363; Ex. 1624, sec. 15, R. 9394; Ex. 1626, sec. 15, R. 9404; Exs. 1628–9, sec. 15, R. 9404–5; Exs. 1632–3, R. 9426; Ex. 1634, sec. 15, R. 9437–8.

[57] E. g., Ex. 151, Sched. B (R. 8835); Ex. 1622, Sched. C (R. 9365).

[58] F. 465, R. 7371 (Ex. 599, R. 9238); Exs. 1814–5, R. 9509 L–P; Ex. 1816, R. 14348C.

the use to which the article was to be put."[39] The district court found (F. 468, R. 7371) that the purpose and result of this factor was to limit the types of purchasers to whom the licensees could sell the unpatented glassware made upon the licensed equipment.[40]

(*d*) *Restrictions designed to limit competition between licensee glassware manufacturers.*—The trial court also found (F. 456, R. 7370) that Hartford has framed its licensing policy to permit it to offer "very substantial protection" from competition to certain glassware manufacturers (Ex. 1772, R. 14261). Thus F. G. Smith, in referring to the efforts to get Obear-Nester to take a license, wrote in 1933 (Ex. 590, R. 13206):

> * * * Levis told Nester he was simply crazy not to get under Hartford's umbrella by taking a license from Hartford * * *

We have already noted the favored position accorded by Hartford to the other appellants.

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[39] Ex. 1809, R. 14341; see R. 4202–6; R. 5466; Ex. 395, par. 5, R. 13002; Ex. 527, R. 13141; Ex. 1808, R. 14326.

[40] Since packers' ware, for example, includes, under the Hartford definition, the common fruit jar only when used commercially, the licensee for packers' ware was deprived of a large section of the fruit-jar market; namely, the trade for home canning purposes. (See Ex. 1290, R. 13880A.) Similarly, since a milk bottle can be used for chocolate drinks, oil, orange juice, and mushroom spawn as well as for milk, the manufacturer licensed to make milk bottles was prevented from selling to those who wish to use the bottles for oil, chocolate drinks, juices, or mushroom spawn. (See Ex. 1808, R. 14326; Ex. 1294, R. 13885.)

Similarly, exclusive licenses were accorded a few other licensees in less important fields (U. F. 461–2, R. 7371; F. 458, R. 7370). The licensees which had been accorded favored positions in certain fields were ever alert to see that Hartford gave them the protection to which they felt they were entitled.[61]

In 1930 H. K. Smith wrote of—

> Hartford's present and long established policy of endeavoring to limit competition between its licensees within reasonable bounds [Ex. 392, R. 12994].

(*e*) *Restrictions designed to stabilize glassware prices.*—In order to stabilize the price of beer bottles, Hartford attempted to maintain the established competitive lines for beer bottles, when the end of prohibition was in sight.[62]

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[61] See, e. g., Ex. 1248, R. 13829; Ex. 425, R. 13047; Ex. 430, R. 13053.

[62] In refusing a license to Universal to manufacture beer bottles, appellant Eldred wrote on March 31, 1933 (Ex. 1363, R. 13935–6):

"We have had many requests similar to yours from our licensees, and unless there is some outstanding reason, due to the nature of the licensee's business, why he should enter the beer field, we are refusing such requests, knowing that in doing so we will be playing our part in an attempt to stabilize the beer business to some degree."

* * * * * *

"We believe that the beer business and the beverage business generally, demands some form of protection, such as we have exercised in the milk-bottle business over a period of years."

The district court found (F. 469, R. 7372) that Owens, Ball, Thatcher, Corning and Hazel frequently induced Hartford to use its licensing system and its patents to assist them in artificially maintaining and stabilizing the price of glassware. Levis wrote F. G. Smith in 1930 regarding the price policy of Owens (Ex. 585, R. 13199):

> I * * * feel that if you could understand our position and were in general sympathy with it, your contact with many of our competitors would tend to assist in educating them as to the folly of the methods they are using, and would be very beneficial in creating a stability in the industry. We, of course, are legally prohibited from contacting these competitors on matters of this kind * * *."[46]

(*f*) *Hartford's licensees covenanted not to make unlicensed glassware on licensed machines.*— Owens (Br. 40) and Hazel (Br. 8) contend that they did not agree under their Hartford licenses not to manufacture ware excluded from their licenses. But Hartford's agreements with Owens (Ex. 569, R. 9120; Ex. 578, R. 9192, R. 9202), and Hazel (Ex. 142, R. 8776) and its standard agreement with other licensees (e. g., Ex. 1624, R. 9371, R. 9384) all provided as follows:

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[46] Cf. Ex. 421, R. 13040; Ex. 583, R. 13195; Ex. 1761, R. 14248.

> The following articles are expressly excluded and shall not be produced under this license.

This was recognized to be an express covenant not to produce articles excluded under the license agreement. Hartford's counsel, W. J. Belknap, so interpreted Hartford's license as late as February 5, 1938, when he wrote an opinion to F. G. Smith to the effect that if Owens and Anchor Hocking produced ware excluded under their respective licenses, Hartford could sue them not only for infringement but also for breach of contract (Ex. 377, R. 12945; Ex. H-5018, R. 14717-8).

12. *The role of appellants I. J. Collins, T. C. Fulton, W. V. Fisher, and J. D. Dilworth in the conspiracy*

The district court concluded that appellants Collins, Fulton, Fisher, and Dilworth had participated in the conspiracies (Concl. 86, R. 7419).

Each of these appellants was associated with Hartford during its participation in activities found by the court to have violated the Sherman Act;[64] and during some of the same period was an officer or director of defendant Anchor Hocking Glass Corporation (U. F. 23, R. 7282), against which the complaint was dismissed as of the close of appellee's case (R. 532).

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[64] F. 15, R. 7280; R. 2892; U. F. 617, R. 7399; U. F. 622-3, R. 7399; U. F. 627-8, R. 7400.

Appellant Collins testified that during all his lifetime he wanted prices "stabilized" and that by "stabilization" he meant he wanted prices "somewhere near the same level" (R. 2915).

He was president of the Hocking Glass Company (U. F. 617, R. 7399), of which Fulton (U. F. 621, R. 7399) and Fisher (Ex. 1663, Fol. 61115, R. 16531) were also officers or directors, and from 1926 through 1937 Collins had been a director of Hartford.

He obtained for Hocking exclusive rights to use Hartford feeders in the manufacture of lantern globes (Ex. 126, R. 12640).

In 1927, Collins objected to the grant by Hartford to Macbeth-Evans of a license for hot mold tumblers (*ibid.*) because Collins thought (R. 2943), so he testified, that—

> * * * we should have some protection, because it being a new item, created a new market, and a lot of money [was] spent in the creation of it, a lot of Tom, Dick and Harrys shouldn't have it, but * * * in fact, Hartford-Empire, did grant Macbeth-Evans a license.

The fact is that Macbeth-Evans did not get the license until approximately two years later (Ex. H–5012, R. 9517–8) and then the license was limited to the production of 90,000 gross per year for drinking purposes only (Ex. H–5012, R. 9518; cf. Ex. 417, R. 13036B). F. G. Smith testified that

in 1927 Collins had convinced Hartford "that the trade was amply supplied" (R. 1264).[45]

Desiring (R. 2896) a license to manufacture pressed tumblers on Hartford's single feeders, which was held exclusively by Monongah Glass Company (Ex. 406, R. 13018), Collins, with the aid of Fulton and others (R. 3013–4), in 1926 purchased practically all the common stock of Monongah (R. 2899-2900), one of the most valuable assets of which was 15,000 shares, or one-sixth of the outstanding stock, of Hartford (R. 2900). On May 4, 1926, after this transaction, Collins became a director of Hartford (U. F. 617, R. 7399).

Turner Glass Company having Hartford feeder rights for certain other types of tumblers (R. 3696), Collins (R. 2907) and Fulton (R. 3696–99) exchanged their Monongah common stock for a substantial minority of the common stock and notes of Turner (R. 2907) and Collins became a member of Turner's executive committee and board of directors (R. 3699).

After negotiating with Hartford (R. 2910–11), Collins helped to arrange a sale of the Hartford stock owned by Monongah, one-third to officers

[45] Contrast this attitude of Collins with his argument (Br. 6) that "from the very beginning" he "persistently sought the removal of the various restrictive provisions herein complained of from the licenses and leases of the companies with which he was connected." See also his brief, at page 25, where it is stated: "The undisputed proof is that he consistently disagreed with the Hartford licensing policy and so expressed himself * * *."

of Hartford and another third to himself and his associates (R. 2909–10), including appellants Fulton (R. 2910) and Fisher (cf. Ex. 1583, R. 8098–9). All three of these appellants have been stockholders of Hartford for some time (U. F. 619, R. 7399; U. F. 622–3, R. 7399).

Because Hartley, president of Turner, refused to put Turner "through the wringer" voluntarily (R. 3730), Hartford (Collins being one of its directors) put Turner into receivership (R. 4097). On February 11, 1931, Collins, on behalf of Hocking, entered into a contract with appellants Thatcher and Hartford (Ex. 1140, R. 9303) for the organization of the company later known as General Glass Corporation, to be owned jointly by Thatcher and Hocking. Hartford agreed to grant it a direct license for all products covered by the Turner and Monongah licenses and to withdraw the license rights of Monongah (R. 9304), and the new company was to acquire the assets of Turner at the receiver's sale. Thatcher and Hocking furthermore agreed to negotiate toward a merger with the new corporation (*ibid.*). This contract was authorized by Fisher, as a director of Hocking (Ex. 1663, Fol. 61115, R. 16531). Upon the formation of General Glass on April 4, 1931 (R. 2975), Collins was elected president, Fulton, secretary and treasurer, and Collins, Fulton, Fisher, and H. C. Mandeville of Thatcher were among those elected directors (Ex. 313, R. 12873). On April 15, 1931, Hartford canceled the Monongah

licenses (*ibid.*). It also canceled the licenses of Turner and its subsidiary, Woodbury, transferred them to General and licensed all the Monongah feeders to General (Ex. 1606, secs. 1 and 2, R. 9328–9).

Monongah being in financial difficulties, but having passed the lowest point thereof and being once more on the upgrade (Ex. 1137, Fol. 60576, R. 16531; Ex. 1780, R. 14281; cf. R. 4140–57), Hartford (Exs. 313–14, R. 12873–6), Collins and Mandeville (Ex. 1140, sec. 7, R. 9304–5) desired to dispose of Monongah quickly at a time when local citizens at the site of the Monongah plant were placing charges against Hartford, Owens, Collins, Mandeville and General of conspiracy "to ruin the Monongah Company and force it out of business" (R. 2929; Ex. 276, R. 12820). On December 10, 1931, the plants and equipment of Monongah were leased through a liquidating corporation (R. 4147) to General until March 31, 1935, with an option to purchase them during that period (Ex. AH–5121, R. 9570–1).[66] On May 1, 1932, operations were shut down and have never been resumed (R. 3020) although the plant showed at least an operating profit (R. 4255).

Collins argues (Br. 24) that General Glass Corporation (of which he was president) engaged in

[66] The agreement was executed by Collins on behalf of General and attested by Fulton (omitted in printing record; see Fol. 19729, Stip. R. 16531).

litigation with Hartford through the Court of Appeals for the Sixth Circuit, opposing Hartford's claim that the Nivison-Weiskopf feeder infringed certain Hartford patents. The evidence shows, however, that this transaction is an outstanding example of Collins' cooperation with Hartford.

Thus, on July 28, 1931, Collins and H. C. Mandeville of General conferred with F. G. and Knox Smith of Hartford with respect to General's proposed acquisition of Nivison (Ex. 314, R. 12876–7). Knox Smith wrote of this interview (Ex. 314, R. 12877):

> We felt that if we could get what would appear on our books as $50,000 damages we could afford to "wash" this out, as above suggested, because of the great practical advantage of, first, getting this N-W business so it would pay up royalties, and, secondly, getting the N-W business into good hands where it would cease to be a disturbing factor in the industry.

On September 30, 1931, General purchased the glass assets of Nivison for approximately $150,000 and Nivison agreed not to manufacture glassware in the United States, East of the Mississippi for ten years (Ex. 287, R. 9006).

Thirty days before the purchase, General Glass had a commitment from Hartford (Ex. 1142, R. 13768B) that it would accept $50,000 for its claims against Nivison and purchase the Nivison patents. This commitment, apparently, was later withdrawn by Hartford (Ex. AH–5123, R. 14826),

and the parties agreed to allow the question as to the damages owed by Nivison to remain unsettled until the decision on appeal (Exs. AH–5123–8, R. 14826–32) from the district court's opinion. Collins conceded, however, at p. 44 of his brief in support of his motion to dismiss the complaint in the district court, that General had "some idea of how much of an obligation it might be required to pay in the event Hartford prevailed in the appeal" (cf. R. 2937).

After the Sixth Circuit Court of Appeals decided the Nivison suit in part against Hartford in 1932 (58 F. 2d 701), General and Hartford negotiated a settlement (Ex. 288, R. 9013) as a result of which Hartford paid General $20,000 and released all claims arising out of any patent infringement, in exchange for a transfer by General to Hartford of the Nivison feeders plus four feeder patents (Ex. H–5884, R. 10901). H. C. Mandeville, of General, believed that these patents covered a type of feeder which did "not infringe in any way" any Hartford patents (Ex. 1142, R. 13768B).

Collins has been on the statistical committee of the Association from 1931 to date (U. F. 617, R. 7399). He was active in Hartford's patent manipulations (see Ex. 1154, R. 13771; cf. Ex. 1161, R. 13782) and participated in a discussion by Hartford's directors of plans to induce Hazel to join the conspiracy (Ex. 2005, R. 14634; F. 618, R. 7399). He negotiated the transaction by which

General surrendered its fruit jar license for the benefit of Ball.[68]

In 1940 appellant Fisher signed on behalf of Anchor Hocking a renewal of one of Hartford's licenses to General (Ex. 1606, p. 1, R. 9326A).

Dilworth is a stockholder of Hartford (U. F. 628, R. 8098). In 1922 he executed the agreement for the formation of Hartford (*ibid.*) which was conditioned on the execution of the Glass Contract with Corning (Ex. 16, Sec. 11, R. 11948). In 1937 he executed a feeder license agreement with Hartford on behalf of Salem, a subsidiary of Anchor Hocking, then called Anchor Cap (U. F. 627, R. 7400). He recognized the production limitations of the Association and that the acquisition of "additional quota" by Capstan would be "very valuable" (Ex. 810, R. 13479–80).

13. *Changes effectuated by the appellants in their relations since October 1938*

On November 12, 1938, after the commencement of the investigation of the affairs of both Hartford and Lynch by the TNEC, Section 8 of the Forming Machine Agreement between those

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[68] F. 375, R. 7356 (R. 2146–7; Ex. 198, R. 8876); F. 620, R. 7399; R. 977–8; Ex. 178, R. 12704; cf. R. 2976.

Compare F. 620, R. 7399, with Collins' Br. (p. 12), where the statement is made that Collins "is only claimed to have participated in *one* transaction found below to have been unlawful, and that in May of 1932," citing F. 210, R. 7323.

appellants was eliminated (U. F. 347, R. 7351).[88a] On the same date, Hartford granted Lynch a non-exclusive license for the manufacture and sale of machines designed to produce wide-mouth and pressed ware (but not narrow-neck ware) without requiring Lynch's customers to obtain Hartford forming machine licenses (U. F. 347, R. 7351).

After filing of the complaint in this suit, the exclusive features in Lynch's suction inventions license to Owens of August 23, 1933 were eliminated on February 16, 1940 (U. F. 512, R. 7378).

On May 20, 1940, the trial of this case was peremptorily set for October 1, 1940. On August 1, 1940, Ball surrendered its residual exclusive rights for fruit jars and released its claim against Hartford for breach of contract for the sum of $425,000 paid by Hartford, and Hartford surrendered its option to acquire Ball feeder inventions (U. F. 513, R. 7379).

The appellee, having on September 10, 1940, under court order, submitted to appellants a summary of practices complained of and relief requested (Ex. H–6113, R. 16256), Hartford, on September 17, 1940, withdrew the exclusive license for glass marbles and balls which it had granted to the Akro-Agate Company (U. F. 520, R. 7380).

[88a] This section penalized Hartford for delivery of any forming machines in excess of those having an aggregate production capacity greater than 40% of the capacity of all forming machines delivered by both parties (*supra*, p. 132).

Hartford and Lynch on September 18, 1940, further modified the forming machine agreement to permit Lynch to sell its narrow-neck forming machines to concerns not having Hartford forming machine licenses (U. F. 510, R. 7378). They also on the same day removed the exclusive features from their feeder license agreement of August 23, 1933 (U. F. 511, R. 7378).

By contract of September 23, 1940, as modified on December 1, 1940, Hartford transferred three important patents, the Peiler punty, Howard auto-blow and Smith reissue patents,[69] to Corning and agreed to pay Corning $1,125,000 for a surrender of Corning's exclusive rights under the Glass Contract, which, together with the 1916 agreement

[69] Dorsey believed that the Peiler punty patent covered the Danner machined used by Corning, General Electric, and others to manufacture tubing (U. F. 66, R. 7291). On June 26, 1928, Hartford, for $350,000, had granted Corning a royalty-free exclusive license under this patent or the manufacture of tubing and cane only (U. F. 70, R. 7291).

Falck of Corning charged in 1927 that Hartford, after its employees had inspected the Corning ribbon machine, had deliberately written into its Howard auto-blow patent application, claims designed to cover this machine (Ex. 699, R. 13394), which was then used for the manufacture of bulbs, but on which no patent was issued until 1931 (U. F. 74, R. 7292). Hartford denied bad faith in the matter (Ex. 700, R. 13398), but in 1930 had granted Corning a royalty-free license exclusive for Corning's field under some of the claims in the patent in so far as they applied to ribbon machines and straight line forming machines (U. F. 76, R. 7292).

Hartford and Corning believed that the Smith reissue patent covered the turret chain machine used by Corning in the manufacture of bulbs (U. F. 79, R. 7293).

between Empire and Hartford-Fairmont, was canceled (U. F. 509, R. 7378).

On October 8, 1940, Hartford notified its feeder and forming machine licensees that it was removing all restrictions and exclusions from its license agreements and would "shortly send" an amended agreement to each of them (U. F. 516, R. 7379); but the district court found (F. 517, R. 7379) that none of the proposed contracts of amendment was executed until on or about February 28, 1941, and that nine licensees, including Ball, Thatcher, and Anchor Hocking, never entered into the proposed amendments.[70]

On October 16, 1940, Ball notified Knox (U. F. 514, R. 7379) and Brockway (U. F. 515, R. 7379) that it was releasing them from their respective long term agreements not to compete in the fruit jar field.

On January 8, 1941, Empire was voluntarily dissolved (Ex. C–5653, R. 15357).

On March 11, 1941, Hartford caused American Thermos Bottle Company to surrender its exclusive rights in Thermos bottles and granted it a non-exclusive license under two patents to manufacture all articles of glassware (U. F. 519, R. 7380).

On October 2, 1941, Hartford removed the restrictions and royalty requirements from "For-

[70] F. 517, R. 7380; Ex. H–5781, R. 9647–9; Exs. H. 5783–91, R. 9673–5; Ex. H–5026, Sched. D, R. 9530.

mer Licenses" covering machines sold by Lynch (U. F. 518, R. 7380).

On January 14, 1942, one week before the trial closed, the restrictions in the 1935 agreement between Hartford and Owens were removed (U. F. 521, R. 7380), and Owens notified Hazel that it was waiving the exclusive provision and ware exclusions in its 1935 agreements with Hazel (U. F. 522, R. 7380).

THE OPINION, FINDINGS, AND JUDGMENT OF THE COURT BELOW

The district court filed its opinion on August 25, 1942, sustaining the Government's prayer for relief (Op.[70a] R. 156–60). After summarizing the facts (Op. R. 17), the district court stated:

> From a study of the entire record, I am convinced that there has not only been a violation of the anti-trust laws, beginning with the first agreement between Hartford and Empire in 1916, but I am convinced that this violation of the laws was deliberate as any that I can find in a review of anti-trust cases. The evidence is so conclusive that I can arrive at no other conclusion.

It sustained the charge that defendants had violated Sections 1 and 2 of the Sherman Act, and, in the case of Hartford and Lynch, Section 3 of the Clayton Act, by conspiring to monopolize and

[70a] The opinion of the district court is printed in a separate volume of the record, with pagination of its own, referred to herein as "Op."

attempting to monopolize, and combining to restrain interstate commerce with respect to patents, glassware-making machinery and glassware, and by excluding others from the fair opportunity to engage freely in such interstate commerce (Op. R. 18). It then discussed in detail the conspiracies related to feeders (Op. R. 18–48), suction machines (Op. R. 48–60), forming machines (Op. R. 60–72), lehrs (Op. R. 72–74), milk bottles (Op. R. 74–78), fruit jars (Op. R. 78–84), and the Association (Op. R. 84–93). It considered the underlying intent to stabilize the industry (Op. R. 93–109), and then took up the manifestations of conscious guilt on the part of the appellants (Op. R. 109–136). In this connection it found that some of the individual appellants had anticipated legal action by the Government and yet gone ahead in spite of that and violated the law; that they had even tried to anticipate the remedies which might be applied and done what they could to forestall the effect of such remedies and to obtain the benefit of their unlawful actions (Op. R. 128–9, 156). After discussing applicable legal principles (Op. R. 141–156), the court decided to attempt to restore competitive conditions without the dissolution of Hartford, if possible;[11] that, in order to prevent further attempts to avoid the effect of a decree, as well as further violations of the law, and to preserve the *status quo*

[11] Hartford could continue as a distributor and servicer of machines.

pending appeal, Hartford should be placed under receivership; that the Hartford leasing system was the greatest abuse and must be abolished; that any future distribution of automatic machinery should therefore be put on a basis of outright sale at reasonable prices to anyone who might desire it; that appellants should be required to license anyone royalty free for the manufacture of machines embodying existing patent rights of the appellants; that new agreements, leases and licenses free of restriction and subject to the approval of the court should be substituted for existing ones; and that various unlawful practices should be enjoined (Op. R. 156–160).

On August 27, 1942, the court filed 628 findings of fact and 89 conclusions of law (R. 7277–7420).[72]

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[72] Owens states (Br. 27) that "the circumstances under which the Findings of Fact were made by the District Judge themselves create deep suspicion as to the accuracy and validity of those Findings." But the record shows the contrary. Proposed Findings of Fact were filed by all parties on July 18, 1942, and over five weeks later, on August 27, the court filed its findings. According to Owens' calculations (Br. 27), the court struck out 89 proposed findings submitted by the Government out of a total of 714. In addition the court inserted two findings which were not proposed by the Government (F. 36, R. 7285; F. 64, R. 7291). These findings state that the 1916 contract, the Formation Agreement, and the Glass Contract of 1922 are "a part of the general conspiracy to control and dominate the industry" (*ibid.*). The only fair inference to be drawn from this is that the court reviewed each finding proposed by the Government during the five week period between their submission and the entering of findings by the court.

The final judgment, entered October 8, 1942, sought to dissolve the monoply by enjoining appellants from further engaging in the distribution of glassware and glassware-making machinery in interstate commerce unless they should agree (1) while engaging in the distribution of such machinery, to offer it for sale to any applicant at reasonable and equal prices (Judgment, par. 23, R. 7434); (2) to license any applicant to use without royalty their existing patents and patent applications in the glassware art; (3) to license inventions covered by their subsequently acquired patents in the glass machinery art to any applicant at a reasonable royalty; and (4) to make available to any such applicant, at cost plus a reasonable profit, copies of drawings and patterns relating to the inventions licensed (*id.*, par. 24, R. 7435–6). Appellants were enjoined from distributing glassware-making machinery in interstate commerce otherwise than by outright sale (*id.*, par. 21, R. 7433).

Appellants were enjoined until "the consequences" of their unlawful "conduct * * * have been fully dissipated," from (1) maintaining infringement suits on patents covering glass-making machinery; (2) attempting to remove glassware-making machinery in the possession of lessees thereof; and (3) collecting royalties for the use of presently patented inventions in the glass machinery art or those covered by pending patent applications (*id.*, par. 26, R. 7437–8). Il-

legal license and lease agreements and other existing contracts between appellants and between Hartford and its licensees were canceled and the insertion of restrictions in appellants' patent license agreements enjoined (*id.*, pars. 27–29, R. 7438–40).

The Association was required to abolish its statistical committee and to elect a new board of directors subject to the approval of the court, upon which none of the appellants should be represented (*id.*, pars. 37–39, R. 7446). A repetition of the practices of the statistical committee, as well as other activities designed to limit production or tamper with the price structure in the glassware industry were enjoined (*id.*, par. 40, R. 7447).

Interlocking directorates and stockholdings (*id.*, pars. 33–36, R. 7442–5) and certain practices of appellants in the Patent Office illegal under the antitrust laws (*id.*, pars. 53–54, R. 7455–6) were enjoined. The acquisition of "competing" or "alternative" patents (*id.*, par. 51, R. 7453) or of patents acquired for the purpose of "blocking off" or "fencing in," the machines or methods of others (*id.*, par. 52, R. 7454) was similarly enjoined. Ball and Lynch were required to divest themselves, respectively, of the Three Rivers plant (*id.*, par. 43, R. 7450) and of certain assets of the business formerly conducted by Ed Miller (*id.* par. 49, R. 7452). The funds which passed between Hartford and Corning, and between Hartford

and Ball, pursuant to the contracts executed subsequent to the filing of the complaint and materially altering the *status quo*, were impounded; and the patents similarly transferred by Corning to Hartford were ordered to be restored to Hartford (*id.*, pars. 44–45, R. 7450).

The order of May 9, 1941, impounding the payments by Hartford and Hazel under their 1932 General License Agreement, was continued in effect (*id.*, par. 46, R. 7451) and Hartford was placed under receivership to preserve the *status quo* pending the appeal (id., pars. 10–20, R. 7429–33), and until the court should be satisfied that its orders had been carried out by Hartford and that there no longer remained a reasonable probability of the resumption of the illegal practices by Hartford. If at any time the Receiver or the Attorney General should conclude that the judgment was not operating to eliminate the practices of Hartford found to be illegal, the Receiver was directed to submit a plan for Hartford's dissolution (*id.*, par. 19, R. 7433).

SUMMARY OF ARGUMENT

The purpose of appellants was to monopolize and restrain the glassware industry by (1) monopolizing and restraining interstate commerce in automatic glassware machinery, and (2) using the illegal power thus obtained to restrain and monopolize the market for unpatented glassware. In both aspects appellants' plan was illegal. It is

not denied that a plan to control the glassware and glass machinery industries would be unlawful apart from the protection derived from the patent laws. The question, therefore, is how far that protection extends.

I

1. The record establishes that a primary object of appellants' scheme was to prevent competition in the sale of glassware, and to concentrate the manufacture of the ware in themselves or concerns subject to their control. Production quotas for the glass industry were established; the manufacture of different types of glass products was divided among the various appellants, both by kind and by quantity, so as to avoid competition with each in its chosen field; and care was taken to "stabilize" the industry so as to prevent price-cutting. The Hartford license system, as supplemented by the Association, was the weapon used to achieve these objectives.

Appellants had no patents on the glassware,[72a] but only on the glass-making machinery. It is well established that patents cannot be legitimately employed to control the supply or price of unpatented articles. *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *International Business Machines Corp.* v. *United States*, 298 U. S.

[72a] Except in one instance, as indicated in footnote 47b, p. 24, *supra*.

131; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458; *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27. These cases have held that such activity on the part of a single patentee violates the Sherman Act.

The conclusion follows *a fortiori* that the antitrust law is violated when the major companies in an industry combine to obtain the issuance of patents and to use patents to achieve the same end. If the present case showed nothing more, the unlawfulness of appellants' conduct would be proved by their plan to control the market in unpatented glassware.

2. Appellants' conduct was unlawful even apart from the control exercised over unpatented glassware. Appellants' scheme to monopolize the glass-machinery industry began before any of their controlling patents were issued. It was part of their plan to obtain control, by purchase or otherwise, of all significant patents in the field, whether or not they had dominant patents outstanding at the time. The patent laws furnish them with no protection during such a period. It may not be unlawful for an individual inventor or concern to plan to invent something in order that he or it may monopolize the production or marketing of the patented article. But a deliberate program to monopolize through the acquisition from the Patent Office and others of all inventions before any patent has been granted obtains no protection

from the patent laws, even if carried on only by a single company, and certainly if carried on by a combination of the leading concerns in an industry. And this would be true even though, as a result of their plan, the conspirators had managed to obtain control of the dominant patents in the field, for it is the control through combination, not the patent, which violates the antitrust laws.

3. Appellants used their combined powers to monopolize and restrain trade in the glass machinery industry through the control of all significant patents. Except in unusual circumstances, a combination of companies owning different patents in the same field to eliminate all competition from other patentees and to pool the patents they hold violates the Sherman Act. *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20; *Standard Oil Co. (Indiana)* v. *United States,* 283 U. S. 163. If patents are pooled so as to prevent a deadlock blocking technical advances and in a manner which will not restrain competition or dominate the industry, a patent pool may not be illegal. *Standard Oil Co.* v. *United States,* 283 U. S. 163. But none of these requisites is present here. Nor do the facts of this case support appellants' contention that the patent pool resulted solely from their legitimate efforts to suppress or to acquire machines which infringed valid patents.

4. The appellants acted in concert to obtain by unlawful means the patents upon which they now rely. Suppression of information as to prior in-

ventions, the manipulation of patents for the sole purpose of hampering competitors, and the deliberate—and successful—plan to deceive the Patent Office and the courts through the use of a supposedly impartial scientific article illustrate appellants' tactics, and their design to obtain the patent monopoly through fair means or foul. A patent obtained by such unlawful means, even by one person acting alone, is unenforceable. *Keystone Driller Company* v. *General Excavator Co.*, 290 U. S. 240; cf. *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488. Such a patent should not be available as justification for what would otherwise be a violation of the antitrust laws. But whether or not this is so as to an individual patentee, a combination to obtain patents by unlawful means contravenes the Sherman Act.

Each of the factors considered above is, we believe, a separate violation of the Sherman Act. If this is true as to any one of them, since all are part of the same plan, all would be illegal. Furthermore, if there be any question as to the illegality of each practice by itself, there can be none as to the unlawfulness of a scheme which embodies all of the above elements in combination.

II

The separate appellants each participated in the conspiracy just described.

Corning controls a 43-percent interest in Hartford, and all of Hartford's licenses and contracts

with other concerns protected the exclusive rights given Corning to manufacture certain types of glassware; Corning on the other hand, was not permitted to use Hartford inventions in the glass-container field.

Owens, as the leading glass-container manufacturer, was Hartford's principal partner in the conspiracy. Owens' 1935 contracts did not constitute a withdrawal from the conspiracy, inasmuch as Owens continued to benefit by and participate in the control of the industry through the Hartford licensing system.

Hazel, the second largest glass-container manufacturer, entered into contracts with Hartford and Owens in 1932 which made Hazel a partner of Hartford and gave it special advantages over all other glassware manufacturers. These contracts cannot be justified as a legitimate settlement of patent litigation, inasmuch as the true reason for the special consideration accorded Hazel was to make it a party to the scheme for controlling the market for unpatented glassware.

Lynch combined with Hartford to "corner the forming machine business." The leading competitor was bought out by Hartford, Owens, and Lynch jointly, and Lynch contracted that no one could obtain a Lynch forming machine without a Hartford forming machine license. To obtain the latter, manufacturers were compelled to accept all the restrictions of the Hartford licensing sys-

tem and to pay royalties for the Hartford feeder whether they procured it or not.

Thatcher was the dominant concern in the milk-bottle field. Thatcher and Owens, with the aid of Hartford, bought up or brought under restrictive license, almost all their competitors; Hartford either refused to grant licenses to others in that field or restricted the number of bottles they could produce in order to protect Thatcher and Owens from competition and price cutting.

Ball was given all the residual license rights in the fruit-jar field in order to bring it into the Hartford system. It bought out many of its competitors, in part with the cooperation of Hartford, and often asked Hartford to eliminate price cutters on fruit jars. Owens and Hazel and one user of unpatented machinery alone were left in the fruit jar field, and there was an understanding that Owens and Hazel would not exceed a stated maximum production of fruit jars.

The Glass Container Association was used to fix production quotas for the glassware industry, discourage newcomers from the field and prevent price cutting. These activities were largely carried on by the statistical committee of the Association, which was controlled by the appellants.

III

The abrogation by appellants of many of the restrictive provisions in their licenses and contracts after the commencement of the Govern-

ment's investigation or while this suit was going on did not disestablish their control over the industry or constitute an abandonment of their prior unlawful conduct so as to make the case moot.

IV

Appellants have attacked many of the provisions of the judgment. We agree that a few minor modifications are proper. In many instances, appellants base their argument on purely hypothetical future situations which may never arise. Other objections are founded on what we regard as a strained and inaccurate interpretation of the judgment's provisions.

Although many provisions of the judgment are discussed in the Argument, only the most important will be considered here.

So far as the decree enjoins the unlawful practices of the appellants, it is in accord with long-established principles.

The power vested in the courts "to prevent and restrain" violations of the Sherman Act has repeatedly been held to require the courts to adopt a measure of relief that will effectively dissolve a combination and neutralize its extension and operating force. *Standard Oil Company* v. *United States*, 221 U. S. 1, 77–78. Pursuant to this principle, the Government prayed for the dissolution of Hartford. The district court, however, refused to dissolve Hartford itself, but instead dissolved the Hartford licensing system, and ordered Hartford

to grant licenses under all patent rights at present in the pool to all applicants, royalty-free, and to grant licenses on future patents to all applicants at reasonable royalty rates.

1. Compulsory licensing was necessary to deprive Hartford of the power to control the industry through continuing to select its own licensees; the exercise of that power has been the root of the monopoly, and was therefore properly destroyed.

Compulsory licensing, standing alone, will not create a competitive industry. Because of appellants' dominant position, the power to collect royalties is in itself a powerful economic weapon in their hands. They have used it in the past to stabilize prices and otherwise to restrict competition. The decree cannot accomplish its purposes if this power is untouched. This burden of royalties would never have been imposed if it had not been for the conspiracy, the patents themselves were the fruits of the conspiracy, and the effects of the monopoly will not be dissipated so long as the public is required to pay royalties on the patents unlawfully procured. The record shows that appellants had anticipated that even if their conduct were held to violate the Sherman Act, the courts would be powerless to deprive them of the benefits of their scheme. If all users of devices covered by the patents are required to continue paying royalties to appellants, this prediction will turn out to have been correct. The powers of a court of equity are not too feeble to cope with such a plan.

In such circumstances, royalty-free compulsory licensing is authorized by the Sherman Act. Nor is there basis for the charge that the judgment is confiscatory in violation of the Fifth Amendment. Property rights generally, and patent rights, which are public franchises, in particular, are subject to general regulatory statutes, and the impairment, or even destruction, of their values through the enforcement of such statutes is not unconstitutional.

2. Appellants are allowed to charge royalties on their future patents. But to have left them completely free with respect to the manner of licensing such patents would have permitted the reestablishment of their control of the industry, for, as a result of their conspiracy, the appellants were in control of the research and development facilities which would have undoubtedly enabled them to continue their dominance over the technology of the industry after the entry of the decree. "* * * it is a reasonable assurance to take that, when an innate proclivity has so abundantly manifested itself over a period of years, it shall be disabled from further opportunity." *United States* v. *Corn Products Refining Co.*, 234 Fed. 964, 1018 (S. D. N. Y.) appeal dismissed, 249 U. S. 621. The compulsory licensing of future patents prevents appellants from using their present power to perpetuate control of the industry, and at the same time permits them to obtain

a reasonable reward from the exploitation of their patents.

3. Appellants are required to abandon the leasing of patented machines and to sell them to applicants at reasonable prices. The leasing of machines was the heart of the Hartford licensing system, for Hartford could control the licensees through the power to withdraw the machines. The requirement that the machines be sold deprives Hartford of a power which it had unlawfully abused, and was an appropriate step toward suppression of the licensing system. Cf. *Ethyl Gasoline Co.* v. *United States,* 309 U. S. 436, 461.

ARGUMENT

Preliminary Statement

When this suit was brought, the appellants were in firm control of substantially the entire glassware industry. The appellants Owens and Hartford controlled the automatic processes which produced ninety-six percent of all glass containers manufactured in the United States. No one could obtain automatic machinery to produce glass containers except with the consent of these two appellants. Appellant Lynch, the only other company of consequence that produced machinery, was tied to Owens and Hartford by arrangements that deprived it of independence. This control of the technology of the industry was used to control the unpatented products of that

technology. By a system of restrictive patent licenses, and by certain collateral devices and agreements, appellants had divided fields of production of unpatented glassware, given certain appellants virtual monopolies of the production of certain types of glassware, and generally "stabilized" the industry by restricting production and eliminating price competition.

As a result of the transactions here involved, the appellants have (1) monopolized and restrained trade in automatic glassware machinery, and (2) used the power thus obtained to monopolize and to restrain trade in unpatented glassware. So far as concerns the ultimate legal issue in this case, these two results of appellants' activities must be considered together and not separately. This follows because all of appellants' activities were colored by an essential unity of purpose. This unity of purpose is the consequence of the obvious economic relationship between the patented automatic machine and the unpatented glassware it produces. It was the relationship between the machine and its products that brought the combination together and united the diverse interests of the appellants in a common purpose.

Hartford, as a patentee, was not content with the normal license fees, rentals, royalties, and other similar rewards it could obtain by a legitimate exploitation of its patents. It desired the broader control and swollen royalties which might

be realized by licenses, not merely of its inventions, but also of the benefits of a regimented and controlled market for unpatented glassware. Those appellants who were engaged in the production of glassware were quick to see the merits of a scheme that added to the advantages of technology, the benefits of a regimented market. Thus, Hartford's program not only gave it profits and control greater than it could have obtained by the proper exercise of its patent rights, but it also induced many manufacturers to acquiesce in Hartford's asserted patent "dominance"—a dominance which otherwise might have been precarious.

Appellants, therefore, pursued one ultimate purpose, i. e., the domination and control of the entire glassware industry. Each of their transactions was prompted by this ultimate motive, and no action insofar as its purpose is concerned can be isolated and considered solely in terms of its immediate consequences; each step taken to monopolize machinery was prompted, at least in part, by the desire to restrain trade in unpatented glassware, and each step to control commerce in unpatented glassware was related to the desire to monopolize machinery. This ultimate purpose is the link that connects the separate transactions here involved as "successive elements of a single connected scheme, * * *" Cf. *Swift and Co.* v. *United States,* 196 U. S. 275, 395–396. Because

the plan is an integrated whole, it cannot stand if any of its basic aspects is unlawful."[73]

In a complex scheme of the sort encountered here, the harm caused by all of the elements of the program together is considerably greater than the consequences of the various parts viewed separately; there is danger that the total effect of the conspiracy in restraining and monopolizing commerce may be lost in any attempt to discuss the parts one by one. Nevertheless, any analysis of the legality of appellants' conduct must necessarily discuss only one aspect of that conduct at a time (cf. Owens Br. 44). To the extent that this method of analysis suggests, however, that the different aspects of that conduct should be considered separately, it is artificial. This caveat should be remembered as we consider the conspiracy in its various aspects.

Appellants recognize that if not justified by the patent privilege their conduct is condemned by the Sherman Act. Because the patent issue lies at the heart of the case, the Court may be assisted by a preliminary statement of our views on the more important questions raised by appellants' patent defense. It is our position:

[73] *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *United States* v. *Univis Lens Co.*, 316 U. S. 241; *O'Brien* v. *United States*, 51 F. (2d) 674, 676 (C. C. A. 7); *United States* v. *Ford*, 58 F. (2d) 1029, 1031 (M. D. Pa.); *United States* v. *Motion Picture Patents Co.*, 225 Fed. 800, 810–811 (E. D. Pa.), appeal dismissed, 247 U. S. 524. Cf. *United States* v. *Masonite Corp.*, 316 U. S. 265, 274.

(1) That any combination of the leading companies in an industry to restrain competition by a pooling of patents is unlawful.

(2) That, even more clearly, a combination entered into prior to the issuance of any patents to the members of the combination, for the purpose of controlling and dominating an industry, through monopolizing all significant patents and inventions by eliminating all competitors either in or out of the Patent Office, is unlawful.

(3) That if, in addition to the grounds of illegality specified above, the patent control was attained by unlawful means, including improper conduct in the Patent Office and the courts, the unlawfulness of the combination is beyond question.

(4) That finally, and in any event, the use by a combination of a pool of patents to restrain competition in an unpatented commodity makes the entire scheme invalid.

Appellants' conduct falls within each of these four categories, and violates the Sherman Act if we are correct in our position as to any of them.

I

The Appellants Violated the Sherman Act by Combining To Monopolize and To Control the Manufacture of Glassware Machinery

Appellants' control of the manufacture of glassware machinery rests upon a combination

or pool of more than 900 patents."[74] Passing for the moment the fact that one of the ultimate purposes of this combination of patents was to control trade in unpatented articles—a clearly illegal purpose—we submit that this combination of patents is illegal for at least three additional reasons.

A. THE PATENT POOL WAS FORMED BY THE LEADING COMPANIES IN THE INDUSTRY FOR THE PURPOSE AND WITH THE EFFECT OF RESTRAINING COMPETITION

This Court has repeatedly recognized that the patent law (35 U. S. C., Secs. 31, 40) grants to a patentee only "an exclusive right to make, use,

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[74] See p. 17, *supra*.

Appellants contend that there was no pooling of patents in the instant case; but they themselves often referred to the combination of patent rights as a "pool" (Ex. 1891, R. 14439; Ex. 50, R. 12519; cf. Ex. 889, R. 13544). Cf. Wood (1942), *Patents and Antitrust Law*, p. 97:

"For our purpose the most satisfactory definition of a patent pool is that it comprises all modes and forms of cooperation between patents held by different interests."

Cf. definition by Rice, *Report, Pooling of Patents* (1935), Hearings before H. Com. on Patents on H. R. 4253, 74th Cong., 1st sess., pp. 1161, 1167:

"For convenience we will use that term to represent every cross-license, or consolidation of ownership, interest, or control of patents which embraces so large a part of an industry that the pool can exercise an undue influence in the industry or where by means of the consolidation of interests the group obtains a domination or a competitive advantage over others in the field."

and vend the invention or discovery" (*United States* v. *Univis Lens Co.*, 316 U. S. 241, 250; *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, 491). This is "the full extent of the [patentee's] monopoly" (*United States* v. *Univis Lens Co., supra*). Although the patent law thus empowers a patentee to monopolize his invention, it contains no provision authorizing him to enter into combinations with others, and "a patent affords no immunity for a monopoly not within the grant" (*Morton Salt Co.* v. *Suppiger Co., supra*). This Court has recently stated that "the owner of a patent cannot extend the statutory grant by contract or agreement" and that "the public policy which includes inventions within the granted monopoly excludes from it all that it is not embraced in the invention (*United States* v. *Masonite Corp.*, 316 U. S. 265, 277). It equally forbids the use of the patent to secure an exclusive right or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant. Beyond the limited monopoly which is granted, the arrangements by which the patent is utilized are subject to the general law."

It has been settled since the decision of this Court in *Standard Sanitary Manufacturing Company* v. *United States*, 226 U. S. 20, that when patentees combine their patents for the purpose and with the effect of monopolizing an industry

or otherwise restraining competition, they violate the Sherman Act."[75] In that case the Court said:

> Rights conferred by patents are indeed very definite and extensive, but they do not give any more than other rights an universal license against positive prohibitions. The Sherman law is a limitation of rights, which may be pushed to evil consequences and therefore restrained (p. 49).

Such a combination is in itself unlawful. *Blount Manufacturing Co.* v. *Yale & Towne Manufacturing Co.*, 166 Fed. 555 (D. Mass.); *United States* v. *Motion Picture Patents Co.*, 225 Fed. 800, 810 (E. D. Pa.) app. dismissed, 247 U. S. 524; *United States* v. *New Departure Manufacturing*

[75] See also *United States* v. *Masonite Corporation*, 316 U. S. 265, 282. Cf. *Standard Oil Company* v. *United States*, 283 U. S. 163. That the protection afforded by the patent law to an individual patentee does not extend to the combined action of the leading concerns in an industry was implied in *Bement* v. *National Harrow Co.*, 186 U. S. 70, 94–95. This was the first case involving the interrelation of the patent law and the Sherman Act. The decision in the main allows a patentee greater powers than have subsequent rulings. The *Bement* case permitted an individual patentee to enter into a contract fixing the price at which his licensee might sell the patented article, but held that the record did not call for a decision as to the legality of such an arrangement covering the entire industry, inasmuch as there was no showing that the contracts "constituted a combination of most, if not all, of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made."

Co., 204 Fed. 107 (W. D. N. Y.).[75a] In the *Blount* case, the court said, at page 562:

> Combinations between owners of independent patents, whereby, as a part of a plan to monopolize the commercial field, competition is eliminated, are within the Sherman Act, for the reason that the restraint of trade or monopoly arises from combination, and not from the exercise of rights granted by letters patent.

This rule was recognized in *Standard Oil Company* v. *United States*, 283 U. S. 163, where this Court upheld a patent pool created for the purpose of resolving extensive patent litigation. The Court's opinion discusses the standards that should be used to decide whether a combination of patents violates the antitrust laws. The Court repeatedly emphasized the fact that the plan there at issue did not result in any "monopoly or restriction of competition" (283 U. S. at 171, 174, 175, 176, 178, 179, 182) either as to the production or sale of ordinary or cracked gasoline or the business of licensing the patented cracking process. The defendants in that case had granted each other non-exclusive cross-licenses, and the arrangement facilitated the development of the

[75a] Cf. *Northern Securities Co.* v. *United States*, 193 U. S. 197, 335, in which the Court said:

"There is a potency in numbers when combined which the law cannot overlook when injury is a consequence."

patented process rather than the contrary (p. 171). The Court took pains to point out that the existence of 21 independently owned cracking processors proved that the contracts did not concentrate the licensing of the process in defendant's hands (pp. 175–176), and that since cracked gasoline was indistinguishable from other gasoline and constituted only 26 percent of the gasoline produced, the defendants could not, and indeed, did not attempt to control the supply or fix the price of cracked or other gasoline (pp. 176–178). The Court further accepted the unchallenged findings of the Master that the Government had not proved its charge that the agreements had been made in bad faith (pp. 180–181).

The opinion makes it plain that it was these circumstances that supplied the basis for the finding that the defendants' plan was legal. The circumstances that would have induced a contrary result were described by the Court in these words (pp. 174–175):

> Where domination exists, a pooling of competing process patents, or an exchange of licenses for the purpose of curtailing the manufacture and supply of an unpatented product is beyond the privileges conferred by the patents and constitutes a violation of the Sherman Act. The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition. * * * But an agreement for cross-licensing and

division of royalties violates the Act only when used to effect a monopoly, or to fix prices, or to impose otherwise an unreasonable restraint upon interstate commerce.
* * *

This language in which the Court describes an illegal combination of patents is plainly applicable to appellants' patent pool. The marked differences that exist between appellants' pool and the patent combination held legal in the *Standard Oil* case—differences which place appellants' conduct beyond the pale of the law—may be illustrated by the following points.

(1) The combination in this case was formed by the dominant companies in the industry who now control the production of substantially all glass-making machinery and of 96% of all glass containers. In the *Standard Oil* case the Court took the view that there was no evidence of substantial control by the defendants either of cracked gasoline or of total gasoline production, 283 U. S. 163, 176–177.

(2) Appellants' pool was designed to concentrate control of all machinery patents in a small group; the advantages of the pool were not, to use the words of the Court in the *Standard Oil* case, "open on reasonable terms to all manufacturers desiring to participate".[76] The appellants

[76] It is clear that the Court in the *Standard Oil* case believed that the combination there was open to all persons desiring to participate.

here have deliberately followed the tactic of buying the patents and businesses of all their independent competitors except in those isolated cases, Lynch for example, where the power of the independent was sufficient to compel his admission to the combination.

(3) The concentration of the control of patents was accompanied by a deliberate program of restricting the freedom of the participants in the pool with respect to the exploitation of their own patents.[77] For example, the licenses given by Corning and Owens to Hartford on gob feeding and forming inventions were exclusive in the container field (Ex. 19, R. 8628; Ex. 55, R. 8633); the licensors were thus barred from licensing independents. The effect of the arrangement made in 1932 between Hartford and Hazel was to impair the power of Hazel to grant licenses under its own inventions.[77a] Even Hartford was not completely free to grant licenses under its own patents. Its freedom to grant licenses, for example, was expressly restricted by Section 22 of its 1924 contract with Owens.[78] (See p. 55, *supra.*) Even

[77] In the *Standard Oil* case the companies participating in the pool were free to extend licenses to independent companies (283 U. S. 163, at 168).

[77a] This resulted from Hazel's acknowledgment of "the validity and broad scope" of Hartford's patents (Ex. 142, sec. 8, R. 8773).

[78] It has been explained earlier that the effect of this provision was broadened by Hartford's admission of the validity and infringement of Owens' Lott patents.

after this provision was formally abandoned, the evidence indicates that the appellants did not regard Hartford as being free from the obligation the provision imposed, *supra, pp.* 57–8, 140–1, 174. Indeed, it is generally clear from the evidence that Hartford was not regarded by some of its coconspirators as free to grant licenses without consultation with them. (*Ibid.*) This practice of restricting the power of the patentee to deal with his own patents is strikingly illustrated by the arrangements with Lynch, which, in effect, prohibited Lynch from granting a license under its forming machine patents to anyone who did not have a license from Hartford.[79]

(4) The Court took the view in the *Standard Oil* case that the licenses granted by the pool were generally unrestricted in their terms (283 U. S. 163, at 170). Here, on the contrary, as we have shown in the statement, the combination deliberately adopted a restrictive licensing policy that divided fields, restricted types of ware, limited production, and generally "stabilized" the industry.

(5) Finally, in the *Standard Oil* case the Court concluded that there was no general intent or purpose to restrain trade. The contrast with the

[79] (*Supra*, pp. 131–6). Indeed, the effect of the arrangement was to prohibit Lynch from ~~granting a license under~~ selling its *forming machines* ~~patents~~ to anyone who did not have a license from Hartford for a *feeder*. This tying provision was invalid under Section 3 of the Clayton Act and was so held by the court below (Concls. 65–6, R. 7415–6).

record here is striking. The appellants' own admissions show that they deliberately embarked on a program designed to monopolize the making of glassware machinery.

Appellants raise a number of defenses in an attempt to justify the legality of their patent combination. Thus, they insist that the pool was a permissible means of resolving patent controversies. Admittedly, "Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than by litigation, is not precluded by the Act." *Standard Oil Company* v. *U. S.* 283 U. S., at 171. But the *Standard Oil* case itself proves that the power to settle does not mean that any patent pooling agreement which disposes of controversy is lawful; if that had been so, there would have been no occasion for the Court's extended discussion showing that the agreements in that case did not restrain competition.

A settlement agreement is a contract, and to the extent that it restrains trade, it is to be tested by the same principles as other contracts. The reasonableness of a restrictive settlement may well depend on whether the parties are in a position completely to dominate an important industry, and on whether the effect of the settlement is unduly to restrain trade. Indeed, the pooling of the major or dominant interests in a field should be subjected to close scrutiny because

the public interest is importantly involved. In such circumstances, one form of settlement may be permissible and another not, and the parties may well be compelled to select the less restrictive method of resolving their private controversies.

The opinion in the *Standard Oil* case conditions its approval of the interchange of patents and cross-licensing as methods of settling controversies in the following language (283 U. S. at 171):

> * * * An interchange of patent rights and a division of royalties according to the value attributed by the parties to their respective patent claims is frequently necessary if technical advancement is not to be blocked by threatened litigation. If the available advantages are open on reasonable terms to all manufacturers desiring to participate, such interchange may promote rather than restrain competition.

These principles were applied by this Court in *United States* v. *Masonite Corp.*, 316 U. S. 265. In that case ten large companies, engaged in manufacturing and selling building materials, were parties to identical agency agreements under which the alleged principal fixed the price at which the agents could sell a patented product. The defendants in that case attempted to defend the arrangement on the ground, among others, that it was the result of a compromise of patent differences among three of the defendants. The

Court disregarded this defense and held the arrangement illegal.

In any event, this defense is available to appellants only if their combination was formed in good faith for the primary purpose of settling patent controversies; if their real purpose was to suppress competition the antitrust laws apply. Recognition of this principle is implicit in the *Standard Oil* case (283 U. S., at 180–181). The Court there relied upon the finding of the master who heard the evidence that the Government's charge of bad faith had not been proved. Here the findings of the trial court are to the contrary. It found that the motive for appellants' acquisition of patent control was the desire to dominate the industry.[86] In its opinion the court below refers to the manner in which the patents were acquired as in itself exhibiting consciousness of guilt (Op. R. 120–134). And in the course of a painstaking review of the evidence on this subject, the Court said, with respect to the activities of Hartford and Owens (Op. R. 124):

> The elimination of patent disputes, which is the reason assigned now by the defendants in this case for the many combinations and acquisitions that the record discloses, appears to be secondary, and the elimination of competition appears to be primary.

[86] Findings—Nos. 48–9, 84, 114, 224, 289, 482–486, 491; R. 7287, 7294, 7301, 7327, 7340, 7350, 7374, 7375.

This conclusion of the district court is amply supported by the evidence summarized in the statement.[81]

Appellants also suggest that the patent combination was legal because Hartford's patents were "dominant" and valid and that it did nothing except acquire "noncompeting supplementary and improvement patent rights" (Hartford Br. 88). The hypothesis of this argument appears to be that the alleged dominance of Hartford's patents permitted it to exclude all others from the field, and therefore it could legally make agreements with infringers which gave it domination of the machine industry. The difficulty with this argument is that the monopoly in the industry has not been achieved by unilateral action by Hartford in enforcing its allegedly "dominant" patents. The monopoly, on the contrary, is the result of joint action and combined effort by the appellees. It should be pointed out in passing that some of the transactions involved in this common effort create grave doubts as to the good faith of Hartford's assertion that its patents are "dominant."[82] But, in

[81] To the extent that appellants rely on the self-serving testimony of their own witnesses in support of their argument to the contrary, the district court's reflection upon the credibility of some of their key witnesses must be taken into account (Op. R. 17).

[82] See footnote 89, pp. 223–4, *infra*. It should be noted here that even if it is assumed that a "dominant" patentee, as appellants assert, has a practically unrestricted privilege to buy "non-competing, supplementary improvement patent

any event, the issue here is not the legality of what Hartford might have done acting alone, but the legality of what Hartford and the other appellants have done acting in combination. Patent pooling schemes that would otherwise be illegal do not secure additional protection because one of the patents happens to be dominant. In the *Standard Oil* case, the Court referred with apparent approval to a ruling of the Master that "It was not necessary to determine whether any of the competing process patents actually infringed another" (283 U. S., at 180). Cf. *United States* v. *Masonite Corp.*, 316 U. S. 265, 280.[83]

Appellants also rely on *United States* v. *United Shoe Machinery Co.*, 247 U. S. 32, and *United States* v. *Winslow*, 227 U. S. 202. In these cases the Court held that a combination of three corporations, each producing machines used for the manufacture of a different part of a shoe, was not illegal, because the constituent companies were not in competition with each other at the

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rights," that privilege cannot exist prior to the date when the patent is issued to him which he asserts is "dominant."

The point that many of the steps taken by appellants pursuant to their campaign for dominance were taken before the issuance of the patents that Hartford now claims to be dominant will be discussed later in the brief. (See pp. 219–21, *infra*.)

[83] Because the court below thought it immaterial whether appellants' patents were infringed, evidence on that issue was excluded on the Government's objection. The Government did not *concede* the validity of appellants' patents, but contended only that that fact was irrelevant.

time of their consolidation and the machines which they respectively produced were noncompetitive.[84] Cf. *Standard Oil Co. (Indiana)* v. *United States,* 283 U. S. 163, 171.

The short answer to this argument is that appellants' activities were not restricted to the combining of complementary and noncompeting inventions.[85] Their object was to control all significant feeder patents and all significant forming machine patents, not merely to combine the feeder and the forming machines so as to enable the

[84] In the *Shoe Machinery* case, Justices Clarke, Day, and Pitney dissented and Justices McReynolds and Brandeis did not participate. The case is no longer followed in at least three important respects. First, a contract provision requiring the use of the licensor's materials with its patented machinery was held illegal in *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27. Second, the subsequent enactment of the Clayton Act was held, in the second *Shoe Machinery* case, 258 U. S. 451, to render the restrictive lease provisions illegal. Third, the excellence of defendant's servicing and machines was held to be immaterial in the second *Shoe Machinery* case.

[85] In discussing the acquisition of supplementary patents in the *Shoe Machinery* case (p. 51) the Court points out that there "was a perfect deadlock"—a situation resulting only when each of two parties owns a patent covering some feature essential to the commercial operation of a machine or process. Cf. *Standard Oil Co.* v. *United States*, 283 U. S. 163, 171, footnote 5. With respect to many of the patent acquisitions by which the pool was built up in the instant case, no such situation prevailed. This is clear, for example, with respect to Hazel's contributions to the pool. Similarly, with respect to the O'Neill (Ex. 973, R. 7986–8015), Raeder (Ex. 973, R. 7999), Bailey (Ex. 973, R. 8007, 8010), Bethel (Ex. 973, R. 7997–8, 8008) and Kucera (Ex. 973, R. 8009) patents,

glassware industry to obtain both from the same source without a patent deadlock.[86]

B. THE PATENT POOL IS ILLEGAL BECAUSE IT IS COMPOSED OF PATENTS THAT APPELLANTS COMBINED TO OBTAIN FOR THE SPECIFIC PURPOSE OF MONOPOLIZING THE INDUSTRY

Thus far we have argued as if the patent pool in this case had been formed by patentees who,

among others, there is no contention that the acquired patents covered any essential operation of the Hartford machines. Hartford did not list these on patent plates attached to its machines (Ex. H–6105, R. 11066–100). The Kucera patents were listed only on plates covering a pneumatic feeder not originally owned by Hartford (Ex. H–6105, R. 11099).

[86] The court in the *Shoe Machinery* case emphasized that each of the corporations enjoyed *lawful* monopolies in its respective fields. In the instant case, the monopoly obtained on each of the complementary machines was obtained by illegal combination. Surely appellants cannot make these illegal monopolies legal by putting them together. Secondly, control of one invention in the instant case was designed to extend the control of others. Hartford realized that the control of each was a guard against loss of control of others (Ex. 388, R. 12966, 12972), and sought forming machine patents to bolster the feeder monopoly (Ex. 320, R. 12893). Such practices are condemned in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 459. Thirdly, the court in the *United Shoe Machinery* case found, in rebuttal of the alleged intent to monopolize, that defendants had refused numerous offers to sell them other concerns, several of which were more important to the alleged scheme than those acquired. Intent to monopolize is manifest in the instant case. Fourthly, patent control, even over complementary machines in the instant case, was in pursuance of a conspiracy to monopolize and restrain trade in machinery and in unpatented ware. The same observations apply to distinguish the *Winslow* case.

having obtained their patents in a normal way, then combined the patents so as to monopolize the industry. We have shown that even on this view of the case, the patent pool is illegal. The fact is, however, that the assumptions made in this line of argument are more favorable to the appellants than the facts warrant. More is involved here than simply a combination of patents for an illegal purpose. In this case the appellants combined for the specific purpose of obtaining patents to monopolize the machine industry, and the asserted patent "dominance" of the pool is the fruit of that conspiracy. The force of this conclusion can be shown by reference to three aspects of appellants' activities.

1. *The appellants' scheme to obtain patents to monopolize the industry was formed and largely executed before the issuance of the patents they now assert are "dominant"*

Appellants' conspiracy to control the industry was effectuated in large measure by concerted action in the Patent Office and elsewhere before the issuance of the allegedly "dominant" patents. By buying up the patent applications and businesses of competitors, and by pooling their own efforts and resources in the Patent Office, appellants prevented the issuance of patents to competitors and assured the allocation of dominant claims to themselves.

The gob feeding patents, now asserted by Hartford to be basic, are the phase-change patent

issued in 1926 (Ex. H–5248, R. 10323), the stuffing of the gob patent issued in 1928 (Ex. H–5249, R. 10401), and the heated hood patent issued in 1937 (Ex. H–5284, R. 10437). Many of the illegal steps in the conspiracy were taken by appellants before the issuance of these patents. Before these patents were issued, Hartford, acting in combination with Corning or Owens, had completed its acquisitions of the patents, inventions, or business of Steimer, Howard, T. R. & B., and W. J. Miller. These steps were all taken for the purpose of monopolizing the glass machinery industry by obtaining control, by one means or another, of all the significant patents in the field. Moreover, not only were these steps taken before the issuance of the dominant patents, but some of them were taken when Hartford admittedly had no significant gob feeder patents of any kind.[87]

Hartford attempts to deal with this aspect of the case by pointing out that although it had no patents during this period, it had applications pending in the Patent Office, and that its activities were merely designed to protect the inventions disclosed in those applications. This defense is without substance. An invention as such gives the inventor no immunity under the

[87] The Hitchcock patents, acquired by Hartford in 1918, expired in 1922. From that time until the issuance of the phase-change patent in 1926, Hartford had no patents that entitled it to exclude others from using gob feeders. (Cf. Ex. 79, R. 12578D.)

Antitrust laws. Cf. *Dr. Miles Medical Company* v. *Parke & Sons Co.*, 220 U. S. 373, 401. A limited immunity does arise when the inventor obtains a patent covering the invention, but that immunity operates from the date when the patent is issued. The immunity has no retroactive effect and prior conduct of the inventor must be measured by the standards ordinarily applicable under the Sherman Act.[88]

2. *Appellants' treatment of their own patent claims and their tactics in the Patent Office were designed, not to provide legitimate protection for their inventions, but to advance the illegal program of the combination*

The evidence shows that the attitude of Hartford and Owens to their patents was determined solely by their desire to form an aggregate of patent claims that would enable them to monopolize the industry. They shifted their position as to the merit, the scope, and the validity of different patent claims as the exigencies of the conspiracy required. Thus, Hartford at first took the position that the Hitchcock patents were

[88] The patent law itself limits the privileges of the patent to a period of 17 years. This statutory period cannot be extended by retroactive operation of the privilege during the time when the application is pending. Hence the rule that the patentee cannot recover damages for any use of his invention while the application is pending and prior to issuance of the patent. *Rees* v. *Lombard*, 21 F. 2d 276 (C. C. A. 9); *B. F. Avery & Sons* v. *J. I. Case Plow Works*, 174 Fed. 147, 149 (C. C. A. 7).

pioneer gob feeding patents and that they disclosed an operative invention. It advanced these contentions both in the courts and, until 1922, in the Patent Office. Furthermore, Hartford used both contentions to attack the Lott patents which were controlled by Owens. Nevertheless, when it appeared that these contentions, if successful, would jeopardize the plans of the combination, Hartford did not hesitate to abandon them; thus in the 1924 agreement with Owens it admitted the validity of the Lott patents and that its own machines infringed them (Ex. 55, R. 8637). Later, it joined with Owens in suppressing the evidence that Hitchcock was an operative gob feeder. (See *supra*, pp. 45–52). Owens likewise shifted its position. It first contended that the Lott patents disclosed a gob feeding system, and then later, by agreement with Hartford, abandoned this contention so that the Peiler stuffing patent might issue with broad claims. Another striking illustration of appellants' willingness to shift their position on the merits of patent claims in order to buttress and to prolong their monopoly is indicated by the fact that Hartford, having first taken the position that the phase-change and stuffing patents issued in 1926 and 1928 were basic, later suggested that they were only improvement patents and that the heated hood patent, issued in 1937, is the basic patent that covers the essence of

the gob feeding principle.[89] This would have extended their control until 1954.

[89] (R. 6217–8.) Hartford would lead the court to believe that its automatic machine embodying "shaped suspended charge feeding" made its appearance "in 1914 and thereafter gradually superseded the Owens suction machine" (Br. 13, 16). This contention of Hartford is misleading, if not absolutely untrue, and is not conceded by our contention that questions as to the *validity* of the patent are irrelevant. Peiler testified that the single feeder was developed in the period from November 1918 to November 1922 (R. 4359) and that prior to 1922 the only feeders Hartford had developed were the paddle and paddle needle feeders (R. 4360). Neither the paddle feeder patent (Patent No. 1,277,254), nor the paddle needle feeder patent (fol. 51408, R. 11998) includes claims directed to shaped suspended charge feeding which Hartford now defines as its system of "gob feeding." Patent No. 2,073,572 (heated hood patent) does not contain either a concept or disclosure of means for shaping the gob (Ex. H–5284, R. 10437).

The first patent now relied upon as one of the fundamental patents attempting to cover the shaping of the gob is the phase change patent No. 1,573,742 (Ex. H–5248, R. 10323). This patent is based upon the single needle application of May 5, 1919. According to appellant Hartford (Br. 14), the phase change shaping preceded the shaping involved in the stuffing Patent No. 1,655,391 (Ex. H–5249, R. 10401), which was also based upon the disclosure of the single needle feeder.

The phase change patent was involved in *Obear-Nester* v. *Hartford-Empire Co.*, 39 F. (2d) 769 (C. C. A. 8) and in *Hartford-Empire Co.* v. *Nivison-Weiskopf Co.*, 58 F. (2d) 701 (C. C. A. 6). Both of these decisions gave an invention date of 1919 for the disclosure of the phase change patent, but both courts limited the scope of the patents within a narrow range, namely to the phase change adjustment for effecting a change of shape of the gob while the machine was in operation; and both courts repudiated the broad contention made by Hartford in those suits that the phase change patent broadly dominated "suspended

Appellants' indifference to the merits of the patent claims they were manipulating and their preoccupation with the purely commercial purposes of the conspiracy is revealed by their own statements. For example, Dorsey, Hartford's patent lawyer, said in June 1923, with respect to the policy to be followed in settling the Hartford-Owens interferences in the Patent Office that "* * * it was to be based upon the greatest good to the pool in getting out the strongest patents as soon as possible" (Ex. 50, R. 12520). Equally revealing was the statement of Carter, made in November 1923 when he was patent counsel for Owens, that two of the top executives of the company believed (Exhibit 611, R. 13229):

> * * * that the advantage of having the feeder field under some patent control is so

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charge feeding" within the definition contended for by the appellants in the instant suit.

The shaping involved in the "stuffing patent" was under consideration in *Hartford-Empire Co.* v. *Hazel-Atlas Glass Co.*, 39 F. (2d) 111 (W. D. Pa.), in which case Peiler was also given an invention date of 1919. The circuit court of appeals in reversing this decision, relying substantially on the Clarke article, proceeded on the theory that the prior art did not disclose the subject matter claimed by Peiler and found it unnecessary to consider the decision of the district court with respect to Peiler's date of invention.

It may be of interest that the "stuffing" patent issued to Peiler in Great Britain was held invalid for lack of invention because of the prior art. *British Hartford-Fairmont Syndicate* v. *Jackson Bros.* (*Knottingley*) *Ltd.*, 49 R. P. C. 495 (C. A. 1932), affirmed 51 R. P. C. 254 (H. L. 1934).

great, from a business standpoint, that this company would rather see such control in the hands of Hartford than to have the field open * * *.

3. *The appellants have attempted to control future inventions in the glass-machinery field*

Appellants' intentions in this respect are evidenced by their program of buying out independent manufacturers and inventors, and in some cases obtaining from them covenants not to engage in the business of manufacturing glassware machinery, and by their arrangements among themselves. For example, Corning, under the 1922 Glass Contract, gave Hartford an exclusive license, subject to a shop right, under all its future inventions in the glass container field (Ex. 19, R. 8628). Similarly, Owens, under the 1924 agreement, gave Hartford an exclusive license subject to a shop right, to all its future inventions in the feeding and forming field (Ex. 55, R. 8633). This provision was eliminated from the Owens contract in 1932 but the admissions of the parties indicate that the formal removal of the provision was not, in fact, intended to change the substance of the relationship. (See p. 105, *supra.*) An analysis of the contract between Hartford and Hazel indicates that its effect will be to discourage Hazel from making machinery inventions in the container field and licensing them to others. (See pp. 263–4, *infra.*) Finally, it should be

noted that the standard form of license issued to all Hartford licensees requires the licensees to assign to Hartford all patents that cover improvements on the Hartford machines (see *supra*, pp. 168–9), and that many of the licenses require the acknowledgment of the validity of all of Hartford's *future* patents. These attempts to control the future technology of the industry are significant both because they reveal appellants' desire to perpetuate control of the industry and because they betray the insincerity of Hartford's assertions that the combination did nothing more than assert the "dominance" of Hartford's patents.

We submit that a combination formed for the purpose of obtaining patents to be used to monopolize interstate commerce violates the Sherman Act. This is not to say that it is unlawful for an individual inventor or patentee deliberately to plan to invent something and to take out a patent thereon for the purpose of monopolizing the production and distribution of the patented article. But the immunity which the patent laws give to individual inventors in this respect cannot be extended to a combination, composed of the dominant companies in an industry, which embarks on a program of acquiring all of the significant patents for the purpose of imposing monopolistic control upon the industry. To the extent that a combination of this kind can, by manipulation in the Patent Office, obtain for itself patents that

exclude others, it is more dangerous to a competitive market than a combination that attempts to combine existing patents held by independent owners. The danger is greater both because the tactics used are more sophisticated than the cruder forms of coercion and combination, and because once the patents are obtained the conspirators can then rely upon the usual presumption of validity and employ all of the machinery of the judicial process to accomplish purposes that are forbidden by the antitrust laws. The conclusion that this kind of a combination is illegal necessarily follows from the cases cited earlier in this brief. (See pp. 205–7, *supra*.)

C. APPELLANTS, ACTING IN CONCERT, USED ILLEGAL MEANS TO OBTAIN THE "DOMINANT" PATENTS INCLUDED IN THE POOL

Appellants' control of the machine industry now exerted through their aggregate of patents is unlawful for still another reason. The record shows that appellants obtained the patents upon which they now rely by unlawful means. These means "were of such an unusual and wrongful character as to bring them within the prohibitions of the law." *United States* v. *American Tobacco Company*, 221 U. S. 106, 181. A patent obtained by unlawful means, even by an individual patentee, is unenforceable, *Keystone Driller Company* v. *General Excavator Co.*, 290 U. S. 240; cf. *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488, and does not

confer even a limited immunity from the antitrust laws.

It is not necessary in this case, however, for the government to rely upon the rule that a patent so obtained by an individual inventor is unenforceable or invalid. We submit that whatever the rule may be as to an individual patentee, a combination which obtains patents by unlawful means and uses them to monopolize and restrain trade violates the Sherman Act. In fact, the issue as to whether the patents now included in the pool, separately considered, are invalid, is not involved in this case. The issue here is whether the patent pool is an illegal combination which violates the Sherman Act and that question can be resolved without determining whether the patents are invalid. Cf. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436 and *United States* v. *Univis Lens Co.,* 316 U. S. 241. Even if the patents, separately considered, are valid in the usual patent law sense, their combination to monopolize trade is illegal. The evidence as to the illegal means used to obtain the patents is relevant, not because any issue is raised as to the patents' validity, but because the illegal means, when used to accomplish a purpose unlawful under the Sherman Act, themselves constitute a separate substantive ground of illegality.[90] *Duplex Co.* v. *Deering,*

[90] The fact that the evidence relied upon to show that the patents were obtained by illegal means might be used in some other proceeding to attack the validity of the patents is immaterial. [Continued on next page.]

254 U. S. 443, 465; *Truax* v. *Corrigan,* 257 U. S. 312, 327.

The unlawful methods used by the appellants to obtain the patents they now assert are dominant, include: The suppression of information as to prior inventions, the manipulation of patents for the sole purpose of hampering competitors, and a deliberate plan to deceive the Patent Office and the courts through the use of a supposedly impartial article.[21]

In its brief (see particularly p. 95), Hartford emphasizes the fact that the government, at the trial, disclaimed all intent to attack the validity of the patents. (R. 901, 4287–4298, 5634–5.) This disclaimer, however, was clearly limited to an attack upon validity in the sense of denying patentability, novelty, or utility. (R. 901, 4287, 4288, 4290). This point was made expressly by government counsel in connection with the stipulation, quoted on p. 95 of Hartford's brief. Counsel said (R. 5636–7):

"For the purpose of showing combinations or restraints in the Patent Office in violation of the anti-trust laws, the government reserves the right to show methods employed in the Patent Office by the defendants, for example, how they obtained priority, or how it was lost, without, of course, on our part, either contesting or denying or admitting the validity of awards of priority. * * * no evidence heretofore or hereafter offered in this suit by plaintiff is, or will be in this suit, directed toward contesting the validity of any patent or the correctness of any award of priority in the Patent Office, *except as above provided.*" [Italics added.]

[21] Inasmuch as the significant point is that appellants, in combination, resorted to illegal means in securing a patent monopoly and not the number of their improper acts, only the most important will be discussed here.

1. *The Clarke article*

We have already shown that even before the acquisition of its basic patents, Hartford was conspiring to obtain a monopoly of glass-making machinery and to control the entire glassware industry. (See pp. 45–52, 76–84, *supra.*) One of the most important weapons used was the Peiler stuffing patent, the validity of which was affirmed in *Hartford-Empire Co.* v. *Hazel-Atlas Glass Co.*, 59 F. (2d) 399 (C. C. A. 3).[92] After that decision, and the settlement between Hartford, Owens, and Hazel which immediately followed, most of the remaining firms outside of the combination abandoned their opposition. This crucial decision was based in large part upon the Clarke article.

In the statement (*supra,* pp. 76–84) we have described in detail the plan concocted by Hartford's and Owens' counsel to deceive the Patent Office

[92] Quite apart from its intrinsic merits, this patent was probably more effectively used as a weapon of the conspiracy than any other single patent Hartford owned. Hartford's own views as to the merits of the patent varied, of course, depending upon the requirements of the conspiracy. In the course of the litigation with Hazel, Hartford asserted that this patent was basic so far as gob feeding was concerned. Later, Brown, Hartford's patent counsel, suggested that this patent, issued in 1928, was only an improvement patent, and that the really basic patent was the heated hood patent (p. 222–3, supra). The latter had been invented in 1912, but the patent covering it was not issued until 1937 (Ex. H–5284, R 10437). If this patent is basic, Hartford's control of gob feeding might be extended to 1954.

through the use of the article, and thereby to induce it to reverse a ruling of an examiner that Hartford's expired Hitchcock patent was the originator of the art of gob feeding. The essence of the scheme was the representation that the article was the work of an impartial author who would normally be reluctant to speak well of labor-saving machinery. The article would have had no weight as the self-serving declaration of the Hartford patent counsel under whose supervision it was actually written. The article was submitted to the Patent Office by Hartford, and was undoubtedly a factor in procuring a reversal by the Board of Appeals of the Examiner's prior ruling that Hitchcock anticipated Peiler, and in securing a decision that the Peiler invention dominated the gob feeding art.

Hartford then brought suit against Hazel and others and introduced the article in evidence as a part of the Patent Office file. The article was not mentioned before the district court, and the decision went against Hartford. Hartford's plight was then desperate; if that decision was affirmed and gob feeding held to be in the public domain, the plan of Hartford and Owens to monopolize glass-making machinery would collapse. In the argument before the circuit court of appeals, Hartford referred to the Clarke article in its brief, and the majority opinion relied on it extensively

as an impartial exposition of the subject.[93] After the decision in Hartford's favor, and pending the rehearing, Hazel investigated the source of the article, but Hartford succeeded in preventing proof of its fraud by paying Clarke $8,000.[94]

Hartford attempts to justify its conduct by asserting that the statements in the article were correct. This suggestion is irrelevant because the truth of the statements in the article is not in issue here.[95] The fraud consisted in deliberately misrepresenting the authorship of the article in the Patent Office and before the circuit court of appeals.[96] These misrepresentations were calculated

[93] Subsequent decisions upholding patents claimed by Hartford to be basic did not mention the Clarke article, but they relied heavily upon the decision of the Third Circuit in the *Hazel-Atlas* case as a controlling precedent. *Shawkee Manufacturing Co.* v. *Hartford-Empire*, 68 F. (2d) 726 (C. C. A. 3), certiorari denied, 292 U. S. 640; *Hartford-Empire Co.* v. *Coe*, 87 F. (2d) 741 (App. D. C.).

[94] This amount was charged on Hartford's books to attorney's fees (p. 101, *supra*).

[95] But see fn. 21, p. 79, *supra*).

[96] After the disclosures as to the genesis of the Clarke article in the case at bar, petitions to vacate its judgment, because procured through a fraud upon the court, were filed in the Circuit Court of Appeals for the Third Circuit in the *Hazel-Atlas* case and in a companion suit against the Shawkee Mfg. Co. and others. The petitions were denied (137 F. (2d) 764), but both the majority and dissenting opinions recognized the fraudulent nature of the scheme. Petitions for certiorari are now before this Court in these cases. *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, No. 398; *Shawkee Mfg. Co.* v. *Hartford Empire Co.*, No. 423.

to deceive even if it is assumed that the statements in the article were correct. Cf. *General Excavator Co.* v. *Keystone Driller Co.*, 290 U. S. 240. Such conduct would clearly have disabled Hartford from *ever* enforcing the patent so obtained (*ibid*). But the consideration of most significance here is that the concerted action of Hartford and Owens to obtain a patent by this means can by no stretch of the imagination be said to find justification in the patent law. Since the object of the plan was to monopolize the glass machinery industry, it unquestionably constituted a violation of the Sherman Act.

2. *Suppression of facts material to the issuance and establishment of patents*

The burying by Hartford and Owens of the "secrets of the Charnel house" (Ex. H–5847, R. 15496); i. e., the facts as to Hartford's demontration of the operativeness of Hitchcock, is an example of the concealment of material facts from the Patent Office by concerted action. (See pp. 45–52, *supra*.) If the operativeness of Hitchcock had been known, Hartford would not have obtained broad patents covering the entire art of gob feeding. The deliberate concealment from the courts of information as to a possible prior use has been held to be a "corruption" which disables a patentee from enforcing the patents. *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S.

240.[97] A conspiracy to suppress information concerning the prior art is obviously not protected by the patent laws. When it results in a restraint of trade in the patented commodities, it accordingly falls within the provisions of the Sherman Act.

3. *Obtaining the issuance of patents for the purpose of "blocking off" or "fencing in" the developments of others*

The Corning and Owens interests joined Hartford in the policy of taking out patents for the purpose of "blocking off" and "fencing in" the inventions of others, as described by H. K. Smith in Exhibit 388 (R. 12968–9), quoted *supra*, pp. 91–2.[98] Dorsey represented both Hartford and

[97] The facts as to the obtaining of the affidavit from W. J. Miller in connection with the purchase of his patent rights (*supra*, pp. 72–4) resemble the facts of the *Keystone* case (see 62 F. (2d) 48, 49–50). In each instance an affidavit that a possible prior use constituted only an "abandoned experiment" was given at the time of the purchase of the affiant's claims under circumstances which cast doubts upon the parties' good faith.

[98] In *Williams Co.* v. *Shoe Machinery Corp.*, 316 U. S. 364, 380, Mr. Justice Black, dissenting, condemned the use of minor improvement patents to preserve a patent monopoly beyond the intendment of the patent privilege in no uncertain terms and as a "horrible example" referred to this very memorandum (Ex. 388) which had been introduced in evidence at the TNEC hearings. The majority sustained the validity of improvement patents, but confined its attention to the question whether there was a novel combination and relied heavily on the concurrent findings of two lower courts. Three Justices dissented.

the Corning interests in the Patent Office and was, of course, responsible for the numerous Hartford applications made and patents issued thereon in pursuance of this policy. He is on record as himself favoring the policy (Ex. H–5405, R. 15118). Exhibit 388 was transmitted to Corning, which was requested to approve it in substance (Ex. 390, R. 12982).[99]

We do not contend that it is necessarily illegal *per se* for an individual inventor to apply for patents which may have the incidental effect of blocking off or fencing in the inventions of others; admittedly, in particular cases, it may be difficult to draw the line between a patent application designed in good faith to protect the applicant's own invention and an application designed to pervert the patent law by preventing others from protecting their inventions. But it requires no refined measurement and no delicate distinction to detect the illegality of appellants' concerted and deliberate policy in this case. The intentional pursuit of a policy to take out "blocking" and "fencing" patents for the purpose of excluding others from an entire field of technology is illegal, certainly when carried on pursuant to a conspiracy to control the market for an

[99] This memorandum was found in Corning's files (Fol. 2410, not printed; see Stip. R. 16531.)

unpatented product.[1] Such a policy conflicts with the primary purpose of our patent laws "to promote the progress of science and useful arts," and when carried on by a combination is condemned by the antitrust laws. Cf. *Ewart Mfg. Co.* v. *Baldwin Cycle-Chain Co.*, 91 Fed. 262, 265 (D. Mass.) and see cases cited *supra* pp. 205–7.[2]

Owens contends that the record shows no connection between Exhibit 388 and Owens, and argues that it cannot be condemned for a state of mind declared by a Hartford lawyer

[1] Deliberate pursuit of such a policy is not uncommon in industry. See Vaughan, *The Relation of Patents to Industrial Monopolies* (1932), 14 Journal Pat. Off. Soc. 95, 103; Hearings before the Senate Committee on Interstate Commerce, 63d Cong., 2d Sess., *Trust Legislation*, vol. 2, p. 1078; Rose, *Foreign Dye Patents—Their Relation to the Development of the American Dye Industry* (1919), 11 Journal of Ind. & Eng. Chem. 1073.

[2] In *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.*, 210 U. S. 405, 428, the fact that a patentee had suppressed a patented invention in order "to make more money with the existing old * * * machine * * * than could be made with the new * * * machines, when the cost of building the latter was taken into account" was held to be no defense against a suit to enjoin infringement of the patent covering the suppressed invention. The decision was clearly not intended to cover the situation in the instant case in which a deliberate and long-term policy of acquiring patents for the suppression of inventions had been pursued by the concerted action of several conspirators, had resulted in the acquisition of a multitude of patents, and contributed to the suppression of competitors and control of the market for an unpatented product. As stated in the concluding sentence, the Court did not intend to pass on situations of this nature, in which "the public interest" was involved (p. 430).

(Br. 192). The record is clear, however, that Owens participated with Hartford in the policy thus declared. Hartford boasted to Owens of its success in fencing in (Ex. 31, R. 12445), and in entering into the 1924 agreement was interested in having Owens' "patents as a part of the general ring fence around the gob feed" (Ex. 34, R. 12456). With knowledge of this policy, Owens took a license in 1932 (Ex. 147, R. 8806–7) under the approximately 35 patents issued on Hartford's 50 applications filed from 1927 to 1929 for the purpose of "blocking off" or "fencing in" the suction inventions of others (Ex. 388, R. 12974; Ex. H–5356, R. 10539); and in 1930, joined "in friendly rivalry" with Hartford to block off O'Neill (Ex. 630, R. 13286; see pp. 92–3, *supra*). One who enters a conspiracy in restraint of trade subsequent to its formation and without simultaneous action or agreement with other conspirators nevertheless becomes responsible as a party to an unlawful conspiracy. *Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208, 226–7, and cases cited.

4. *Abuses of Patent Office procedure*

An important abuse of Patent Office procedure was the manipulation of patent claims by agreement between Hartford and Owens upon the representation to the Patent Office that "controversies" were being submitted to arbitration.

(See pp. 84–7, *supra.*) Cf. *Julius Kayser & Co.* v. *Rosedale Knitting Co.*, 98 F. 2d 839 (C. C. A. 3), certiorari denied, 305 U. S. 649. The object of this was to rearrange the material available to both companies in the manner which would give the combination greatest commercial advantage. "The greatest good to the pool" (Ex. 50, R. 12520) and not an honest judgment as to the merits of the inventions involved was the motive that prompted appellants' disposition of these asserted "controversies."

Appellants are also shown to have intentionally delayed numerous interference proceedings, *supra,* pp. 87–90. This Court has termed such action an "evasion" of the patent statutes which defeats their benevolent aim. Cf. *Woodbridge* v. *United States,* 263 U. S. 50, 56; *Remington Cash Register Co.* v. *National Cash Register Co.,* 6 F. 2d 585 (D. Conn.). Appellants also subjected their rivals to harassment in the Patent Office by the prosecution simultaneously of numerous claims in different applications owned by different corporations but controlled by the same interests. (See *supra,* pp. 67–72.) They resisted all efforts to compel Hartford to elect to prosecute on a single application as required by Patent Office rules; they provoked interferences; and planted "trap" applications. (See *supra,* pp. 90–1.) Such conduct is certainly not necessary to the lawful exercise of the patent privilege, and when availed of

by a combination for the purpose of monopolizing and restraining trade, violates the antitrust laws.

II

THE APPELLANTS HAVE VIOLATED THE SHERMAN ACT BY COMBINING TO MONOPOLIZE TRADE IN UNPATENTED GLASSWARE

Thus far we have argued that appellants violated the law by combining to monopolize glass-making machinery. As we have shown (*supra*, pp. 21–4, 27–9, 52–4, 98–9, 142–6, 155), however, the monopoly of the machinery was not an end in itself; the appellants' ultimate purpose was to control unpatented glassware as well as the machinery, and this purpose permeated all of appellants' activities. This in itself would make appellants' conspiracy unlawful, even if the Court should not accept our arguments as to the independent illegality of the plan to monopolize glass-making machinery.

The record establishes that a primary object of appellants' scheme was to prevent competition in the sale of glassware, and to concentrate the manufacture of the ware in themselves or in persons subject to their control. (See Op. R. 94–109.) Production quotas for the glass industry were established; the manufacture of different types of glass products was divided among the various appellants, both by kind and by quantity, so as to avoid, or to limit, competition in the different fields; and care was taken to "stabilize" the

industry so as prevent price cutting. The Hartford license system was the principal weapon used to achieve these objectives.

Appellants had no patents on the glassware,[24a] but only on the glass-making machinery. It is well established that a single patentee cannot legitimately employ his patent to control the supply or price of unpatented articles. *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436; *International Business Machines Corp.* v. *United States*, 298 U. S. 131; *Leitch Mfg. Co.* v. *Barber Co.*, 302 U. S. 458; *Carbice Corp.* v. *American Patents Corp.*, 283 U. S. 27. The conclusion follows *a fortiori* that the antitrust law is violated when the major companies in an industry combine their patents and their economic power to achieve the same end.

Appellants' program to eliminate, or at least to lessen, competition in the marketing of unpatented glassware was generally referred to by them as "stabilizing" the industry. By this euphemism, the trial court concluded appellants meant the "elimination of price-cutters, the establishment of uniform and high prices, the division of fields or lines of ware, and the division of the market by means of a quota system, each manufacturer to stay reasonably close to his apportioned quota of the sales of each kind of glass

[24a] See footnote 47b, *supra*, p. 24.

product, as well as the control of production through the power to refuse, and the refusal to license new companies. The ultimate goal of stabilization, * * * appears to have been a quieting and levelling off of competition for the ultimate purpose of attaining price stability in a price structure that would be highly remunerative to the parties concerned" (Op. R. 94).

1. *The division of fields.*—The cornerstone of the Hartford system is to be found in the contracts between Corning and Hartford, creating the initial division of fields of glassware. Hartford was not to permit any other of its licensees to make Corning's specialized products, and Corning was not to invade the container field (Ex. 19, R. 8624–5, R. 8628). The restriction as to Corning ware was recognized in the subsequent contracts, including the Owens and Hazel agreements,[8] and was imposed upon all of Hartford's licensees (R. 1186–7).

By contract, license, or oral understanding, other companies were given exclusive or semi-exclusive rights in other fields. Exclusive rights were granted to American Thermos Bottle Company to produce thermos bottles (U. F. 462, R. 7371) and to Akro-Agate Company to produce marbles (U. F. 461, R. 7371). Ball obtained all the "residual" rights to produce fruit jars (U. F.

[8] Ex. 55, R. 8568–9; Ex. 142, R. 8776–8; Ex. 145, R. 8798–800; Ex. 569, R. 9120–2.

385, R. 7385); no new licenses were to be granted in that field. Despite the absence of any written agreement, Thatcher was in effect similarly protected against all but Owens in the milk bottle field. (See *supra*, pp. 140–2, 145.)

An agreement to divide fields of competition or to refrain from competition is invalid. *Addyston Pipe and Steel Co.* v. *United States*, 175 U. S. 211, 241; *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 833 (S. D. N. Y.) certiorari denied, 212 U. S. 585; *Butchart* v. *United States*, 295 Fed. 577, 579 (C. C. A. 9). The fact that such a division is made under the guise of patents is immaterial. *Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555 (D. Mass.). The combination between patent owners to effectuate such a division for the purpose of controlling an industry is what renders it invalid. Cf. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208; *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30; *United States* v. *First National Pictures*, 282 U. S. 44; *Strait* v. *National Harrow*, 18 N. Y. S. 224 (Sup. Ct. 1891).

As a corollary to the grant of these exclusive privileges, all Hartford licenses (except those to Owens and Hazel) both told the licensee what type of glassware he would be permitted to make [4] and the types he was precluded from manufactur-

[4] The licensed fields are listed in Exhibit H–5750, R. 15436. The licenses themselves may be found in the record at R. 8827–9452.

ing. In general, licensees were allowed to produce only the types of containers they had previously manufactured. (See *supra*, p. 165.) The licenses to Owens and Hazel contained no such restrictions, except that both companies were to refrain from entering the Corning field and that Hazel was not to make milk bottles.

2. ***Restrictions as to quantity.***—In the main, there were no contractual restrictions as to the quantity of glassware to be produced by the appellants themselves.[5] Many smaller licensees, however, were limited in the number of various types of containers they could make.[6] Indeed, the restrictions imposed were so great that, in one instance, the effect was to compel the licensee completely to withdraw from the field (*supra*, pp. 144–145).

Appellants did not rely exclusively on these license restrictions to reduce the production of glassware and thereby to prevent excessive competition. The system of forecasts and quotas established under the auspices of the Association had the same purpose and effect. (See pp. 160–2, *supra*.) Moreover, the Association sought, often with success, to discourage newcomers from entering the industry and to prevent increases in producing capacity. (See pp. 158–160, *supra*.)

[5] Hazel and Owens were restricted as to fruit jars (see *supra*, pp. 151–4), and Hazel as to tumblers (Ex. 1769, R. 9509), and milks for a short period (Ex. 163, R. 8866–7).

[6] These restrictions are listed in Exhibit H–5750, R. 15436.

3. *Stabilization of prices.*—One of the basic purposes of the conspiracy was to prevent excessive price competition in the marketing of ware. The record is replete with expressions of manifestations of intent of the appellants, especially Hartford and Owens, to "stabilize" the glassware industry.[7] (See opinion below, Op. R. 93–110.)

The restrictions upon fields and the quantity of production, to which we have referred, were directed to this end. In addition, it was the policy of Hartford not to license price-cutters,[8] and the

[7] Walter Buck, counsel for the Buck Glass Company and for other Hartford licensees, has filed a brief in this court as *amicus curiae*, contending that the relief granted by the court below will be detrimental to them because of their need for Hartford's technical service.

The interests of these licensees may be indicated by a communication from an officer of the Buck Glass Company to F. G. Smith, dated May 23, 1935, which states in part (Ex. 2001, R. 14631–2):

"* * * I talked to Jim Morrison of the Obear Nestor Company, and he stated that they had a feeder which could be built and sold free of interference from you, * * *."

* * * * *

"My advice to Morrison was as follows:

"'The only really effective control exercised in our industry is through the Hartford agreements. If another feeder comes into the market, it might reduce the amounts of royalties paid by various people now, but it would entirely destroy the protection which various people enjoy in their principal lines. I, therefore, advise you, for the good of the industry and your own operating company, to work out some plan with Hartford whereby you can realize on the feeder and, at the same time, maintain the various ware alignments which now exist in the industry.'"

(Cf. Op. R. 104.)

[8] *Supra*, pp. 22–23, 165.

other licensees frequently urged Hartford to apply this policy.[9] Indeed, the stabilizing effect of the licensing system upon prices was the magnet which so readily drew glassware manufacturers into Hartford's orbit.[10] Special efforts were made to buy out rival firms which sold at lower prices than appellants.[11] The Association (acting through a representative of Hazel, *inter alia*) combined with Owens to establish a system of price leadership in the field of narrow-neck ware.[12] (See p. 298 *infra*.)

Admittedly, the evidence falls short of establishing that appellants regularly agreed upon the specific prices to be charged for particular kinds of glassware. But this measure of proof is not required; "* * * the machinery employed by combinations for price-fixing is immaterial." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 223. A combination can violate the antitrust laws by concerted conduct that is designed

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[9] *Supra*, pp. 43, 57, 145, cf. p. 94.

[10] E. g. Ex. 23, R. 12407; Ex. 1363, R. 13935; Ex. 585, R. 13198; Ex. 787, R. 13464; Ex. 155, R. 12675; Ex. 395, R. 13002; R. 2210–1; R. 2216; R. 2915; see Op., R. 93–109.

[11] Thatcher was inspired to purchase Peerless, and Ball to purchase Three Rivers, in large part because these were price-cutting concerns. (See pp. 145, 156–7, *supra*.)

[12] There was also price leadership in other fields, but the court below refused to make any findings as to the method by which any price leadership became established. Cf. Carter's statement that it was desirable to sue Lamb and Nivison-Weiskopf for infringement because they were price cutters (Ex. 626, R. 13273–4; *supra*, fn. 42, pp. 94–95).

to eliminate price competition even if its members do not agree upon specific prices. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *Sugar Institute, Inc.*, v. *United States*, 297 U. S. 553; *American Column & Lumber Co.* v. *United States*, 257 U. S. 377.

4. *The licensing system.*—The Hartford licensing system was the means whereby many of these restrictions were imposed upon the industry. Licenses could not be obtained unless the applicant was willing to comply with the Hartford policy; in many instances, they could not be obtained at all.[13]

The system was so designed as to perpetuate the monopoly indefinitely. Under the Hartford standard license and lease (e. g. Ex. 1624, R. 9368) the licensee acquired glassware-making equipment which he could never own, with the right to use it for a period of eight years.[14] Hartford employees at all times had the right of access to equipment for inspection and to replace license plates. Patent numbers were voluminously posted on the license plates attached to the equipment (Ex. H–6105, R. 11066); and as new patents issued, their numbers were added to the plates (R. 5414; R. 6175).

[13] Appendix, Section I, pp. 416–417.

[14] The agreement was renewable for another term of eight years at the licensee's request before the expiration of the original term (Ex. 1624, R. 9371).

At the expiration of the first eight-year term, the licensee was operating partly under the old and partly under new patents, the validity of which he had already conceded in the original license and lease agreement. There being no provision whereby he could obtain title to his equipment, he had to renew the agreement every eight years. If he tired of the endless payment of royalties, he could not step out of the arrangement because this would necessitate his returning the leased equipment. He could not build his own equipment unless he were willing to risk his business on being able to avoid the method patents, periodically issued, which Hartford at different times claimed covered the whole gob-feeding art and the validity of which he had acknowledged in the agreement. He knew that an attempt to do this would subject him to interminable and expensive patent litigation. As the old patents, such as the Hitchcock or the early Peiler patents expired, he was still bound to renew the agreement because he had, in effect, acknowledged that the old equipment was covered by patents to be issued in the future, such as Peiler and Steimer,[15] although those patents

[15] These patents were not employed as improvements; each in its turn was claimed by Hartford to dominate the entire gob-feeding art.

might not involve any change in the old machine.[18a] Failure to comply with the restrictive features of the licenses would then have endangered the licensee's right to continue in business; and failure to maintain "stable" price levels might have resulted eventually in inability to retain one's license. There was seldom need to enforce these restrictions, however, inasmuch as, even with them, the members of the industry recognized the advantage of remaining under the Hartford protective umbrella.

Under similar circumstances, this Court has insisted that the entire licensing system be stricken down. *Ethyl Gasoline Corp* v. *United States*, 309 U. S. 436, 461; *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254.

5. *The control exercised over unpatented glassware was illegal.*—Insofar as the purpose and effect of the conspiracy was to prevent price competition in an unpatented commodity, it was clearly in violation of the antitrust law. This would be true even if the policy were regarded as

[18a] This followed from the facts that the license apparently included all patents and applications reading on the leased machinery and methods employed therein (see e. g., Ex. 1624, Preamble, Secs. 1 and 8 and Sched. E., R. 9369–70, 9373, 9386) and that the licensee agreed not to dispute the validity of the patents under which the license was granted so far as they applied to the methods and machines licensed (*ibid.*, Sec. 15, R. 9375–6). The license contemplates that the licensor should place patent plates thereon (*ibid.*, Sec. 13, 9374–5).

having been imposed by a single patentee (*Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 456; *United States* v. *Univis Lens Company*, 316 U. S. 241, 250–252), and is *a fortiori* the case when enforced by a combination of competitors or potential competitors (*United States* v. *Masonite Corp.*, 316 U. S. 265; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20).

The same is true as to the restrictions upon the kind and quantity of unpatented glassware to be manufactured, particularly when imposed by a combination of concerns. Restrictions on production effected by combination of course violate the Sherman Act, apart from their effect upon prices. *American Column & Lumber Co.* v. *United States*, 257 U. S. 377, 412; *Gibbs* v. *McNeeley*, 118 Fed. 120, 127 (C. C. A. 9); *United States* v. *Eastman Kodak Co.*, 226 Fed. 62, 77 (W. D. N. Y.), appeal dismissed, 255 U. S. 578; see *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 497; cf. *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 241. The voluntary quota system sponsored by the Association was obviously not protected by the patent law. Nor may a licensing system be utilized to reach the same result. The right to control the marketing of the glassware is not within any patent monopoly. "A patent operates to create and grant to the patentee an exclusive right to make, use, and vend the particular device de-

scribed and claimed in the patent. But a patent affords no immunity for a monopoly not within the grant, *Interstate Circuit* v. *United States,* 306 U. S. 208, 228, 230; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 456, and the use of it to suppress competition in the sale of an unpatented article" is unlawful. *Morton Salt Co.* v. *Suppiger Co.,* 314 U. S. 488, 491. "Beyond the limited monopoly, which is granted, the arrangements by which the patent is utilized are subject to the general law." *United States* v. *Masonite Corp.,* 316 U. S. 265, 277. A patentee "may not, by virtue of his patent, condition his license so as to tie to the use of the patented device or process the use of other devices, processes, or materials which lie outside of the monopoly of the patent licensed [citing cases]; or condition the license so as to control conduct by the licensee not embraced in the patent monopoly." *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. at 456. In *American Equipment Company* v. *Tuthill,* 69 F. (2d) 406 (C. C. A. 7), the court applied these principles to a restriction as to the quantity of an unpatented article (brick) to be made on a patented machine, saying (p. 409):

> The agreement, so far as it licensed the use of the patented machine or device used to make brick, was unobjectionable. It was an exercise of a right given the patentee by his patent grant. In so far as it fixed, curtailed, and allotted the number of brick

which each licensee could make, however, the agreement was subject to the antitrust laws of the State of Illinois and the United States.

Cf. *Barber Colman Co.* v. *Machine Tool Co.*, 136 F. (2d) 339 (C. C. A. 6).

Appellants cite cases which they assert support the validity of this type of restriction (see Hartford Br. 116–119). But the decisions of this Court cited (*Mitchell* v. *Hawley*, 16 Wall. 544; *Bement* v. *National Harrow Company*, 186 U. S. 70; *Rubber Company* v. *Goodyear*, 9 Wall. 788; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, aff'd 305 U. S. 124) do not support appellants' position; at the most they hold only that a single patentee may restrict the use of the patented article itself provided that the Court is satisfied that the restriction is "normally and reasonably adapted to secure pecuniary reward from the patentee's monopoly." *United States* v. *General Electric Company*, 272 U. S. 476.[18b] These decisions did not involve restrictions upon competition in unpatented goods pro-

[18b] The area within which a licensor may impose restrictions without violating the antitrust laws has been steadily narrowed by this Court. Cf. decision in *Bement* v. *National Harrow Co.*, 186 U. S. 70, with the decision in *Motion Pictures Patents Company* v. *Universal Film Company*, 243 U. S. 502, and the decision in *United States* v. *General Electric Company*, 272 U. S. 476, with the decisions in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 346, *United States* v. *Univis Lens Co.*, 316 U. S. 241, and *United States* v. *Masonite Corp.*, 316 U. S. 265.

duced on a patented machine."[16] The most recent of these decisions sustaining a restriction upon the use of a patented article, the *General Talking Pictures* case, was by a divided court,[17] and the ruling should not be extended in a manner which will bring it into conflict with the basic principle (see pp. 240, 249–50, *supra*) that a patent may not be used to control an unpatented commodity. "Since patents are privileges restrictive of a free economy, the rights which Congress has attached to them must be strictly construed so as not to derogate from the general law beyond the necessary requirements of the patent statute." *United States* v. *Masonite Corp.*, 316 U. S. 280. "* * * the public policy which includes inventions within the granted monopoly excludes from it all that is not embraced in the invention. It equally forbids the use of the patent to secure an exclusive right

[16] The opinions in a number of these cases seem to rest on the reasoning that because a patentee can withhold his patented invention from anyone he can license anyone or everyone to use his invention on any condition he pleases. See particularly *Bement* v. *National Harrow Company*, 186 U. S. 70, 93; *Henry* v. *Dick Co.*, 224 U. S. 1. This reasoning was repudiated by the Court in *United States* v. *Masonite Corp.*, 316 U. S. 265, 277, where the Court said:

"* * * But it will not do to say that, since the patentee has the power to refuse a license, he has the lesser power to license on his own conditions. There are strict limitations on the power of the patentee to attach conditions to the use of the patented article."

[17] Justices Black and Reed dissented (305 U. S., at 128–133).

or limited monopoly not granted by the Patent Office and which it is contrary to public policy to grant." *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 492.

The fact that the restrictions in these cases were imposed by a single patentee and not by a combination of firms also makes the decisions inapplicable to the case at bar. Nothing said in those decisions may be regarded as supporting the validity of restrictions imposed by a combination of patentees for the purpose of restraining trade; the opinion in the *Bement* case recognizes the possibility that restrictions so imposed may be illegal even as to patented articles (186 U. S. at 94–95).[18]

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[18] Most of the cases cited from the lower courts are distinguishable on the same basis as the decisions cited from this Court (*Aspinwall Manufacturing Co.* v. *Gill*, 32 Fed. 697, 698 (C. C. D. N. J.); *Goshen Rubber Works* v. *Single Tube Automobile & Bicycle Tire Co.*, 166 Fed. 431, 432 *et seq.* (C. C. A. 7th); *Cinema Patents Co., Inc.* v. *Columbia Pictures Corporation*, 62 F. (2d) 310, 311–312 (C. C. A. 9th); *Pope Manufacturing Co.* v. *Owsley*, 27 Fed. 100, 104 (C. C. N. D. Ill.); *George Close Co.* v. *Ideal Wrapping Mach. Co.*, 29 F. (2d) 533, 534–535 (C. C. A. 1st); *Good Humor Corporation of America* v. *Popsicle Corporation of United States*, 59 F. (2d) 344 (D. Del. 1932); *Vulcan Mfg. Co.* v. *Maytag Co.*, 73 F. (2d) 136, 138–139 (C. C. A. 8th), appeal dismissed, 294 U. S. 734; *Sinko Tool & Mfg. Co.* v. *Casco Products Corporation*, 89 F. (2d) 916–918 (C. C. A. 7th); *Westinghouse Electric & Mfg. Co.* v. *Tri-City Radio Electric Supply Co.*, 23 F. (2d) 628, 630–631 (C. C. A. 8th); *Libbey Glass Co.* v. *McKee Glass Co.*, 216 Fed. 172, 176 (W. D. Pa.), affd., 220 Fed. 672 (C. C. A. 3d), certiorari denied, 238 U. S. 624; *Radio Craft Co.* v. *Westinghouse*

III

The Arguments of the Separate Appellants as to Why They Were Not Parties to the Conspiracy Are Without Merit

A. CORNING

As the owner of a 43% interest in Hartford, Corning has always been one of the principal parties to and beneficiaries of the conspiracy. The 1916 agreement between Hartford and Empire specifically divided the fields of ware, giving to Hartford the container field and to the Empire-Corning group the non-container field. It also suppressed actual or potential competition in the machinery business between Hartford and Empire.[19]

Electric & Mfg. Co., 7 F. (2d) 432 (C. C. A. 3d). To the extent that they are not, the decisions would be in conflict with the cases cited on pp. 240, 242, *supra*. In *American Equipment Company* v. *Tuthill*, *supra*, the Seventh Circuit recognized that its earlier decisions must be regarded as modified by this Court's subsequent rulings concerning control of unpatented commodities (69 F. (2d), at 408–409). Furthermore it should be noted that of all of the foregoing cases cited by Hartford only the *Goshen Rubber Works* and the *Vulcan Manufacturing Company* cases involved the validity of the restriction.

[19] Corning and Empire state (Br. p. 1) that subsequent to 1915, Empire was not active as a machine development company, but the Agreement for the Formation of Hartford-Empire, dated October 6, 1922 (Ex. 16, R. 11943), recites:

"Whereas, the * * * Empire Company, * * * has for more than ten years last past been engaged in the development and licensing of inventions and machinery in-

Again in 1922 the fields were divided[29] and patents were pooled deliberately for the purpose of dominating outsiders. Prospective competition in the manufacture of glass-making machinery and in the manufacture of glassware was eliminated. Thereafter, the Hartford licensees were precluded from using Hartford equipment in the noncontainer field unless Corning consented.

The 1922 agreement was thus a restraint upon trade and at least an attempt to monopolize it. The record is clear, moreover, that Corning occupied a monopolistic position with respect to heat-resistant ware.[30]

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tended primarily for blowing glassware known as paste mold glassware * * *."

Appellant Falck testified that the development work referred to in this Agreement "was being done by others" for Empire "through its contracts" (R. 5563). Moreover, F. G. Smith wrote in 1920 that *Corning* was "developing a new feeder of their own" (Ex. 14, R. 12389).

[29] Corning argues (Br. 5) that non-container glassware constitutes a "separate and distinct" industry. This was denied in their answers by Hartford (Ans. par. 29, R. 379) and Owens (Ans. 29, R. 179), who, with Corning and Empire (Ans. par. 29, R. 325, R. 341), also denied that the glassware industry could be divided into two divisions. F. G. Smith did not consider non-containers a separate industry when he wrote the passage from Exhibit 6 (R. 12370) quoted *supra*, pp. 28–9.

[30] Corning contends that the ability of the McKee Glass Co. to manufacture heat-resistant ware automatically without the use of the Hartford machine disproves any monopoly by Corning in this field (Br. 49). R. D. Brown's testimony that McKee was using a vacuum feeder which did not

Corning contends (Br. 33) that there is no evidence in the record to support the statement in the district court's opinion (Op. R. 25) that one of Hartford's purposes in entering the Glass Contract was to eliminate Corning as a manufacturer of containers. In 1920 during the negotiations respecting the terms of the Glass Contract, Honiss, of Hartford, wrote appellant F. G. Smith (Ex. 10, R. 12385):

> In Any Case, it seems important to provide that the Corning people will not be left free to use, or to license others to use, any of their prospective new glasses for the making of ware which would enter into competition with our lines of ware.

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infringe Hartford's patents (R. 6107–8) was contradicted by Eldred of Hartford who believed that it did infringe (R. 3623–4). The record shows that McKee resorted to a vacuum feeder for heat-resistant ware, only after trying unsuccessfully for years to induce Corning to permit Hartford to grant McKee a license (Ex. 357, R. 12924; Ex. 362, R. 12930; Ex. 1356, R. 13929; Exs. 1752–3, R. 14235–40); and after Hartford had enjoined McKee's use of the Shawkee feeder, *Hartford Empire Co.* v. *Shawkee Glass Co.*, 68 F. (2d) 726 (C. C. A. 3).

Corning claims (Br. 48) that it manufactures only 30% of heat-resistant ware on Hartford feeders. The record shows, however, that the balance of the heat-resistant ware is made by hand. This 30% constitutes all of the heat resistant ware made by Corning on machines (R. 1469). This case only involves the monopolization of machine-made glassware.

I. J. Collins, president of Anchor Hocking, testified that there was no other way than on Hartford feeders that Anchor Hocking could manufacture heat-resistant ware cheaply enough to compete with its competitors (R. 2998).

Moreover, in connection with the 1916 agreement, Dorsey had called A. B. Houghton's attention to the fact (Ex. H-5223, R. 14902) that:

> * * * by surrendering our rights, except for the reserved goods, we are debarring ourselves from using certain schemes in connection with the general bottle industry if we desire to enter it. * * *

Subsequently, in 1929–31, Corning asked Hartford for rights under Hartford's inventions to manufacture containers from ordinary glass (Corning Ans. par. 46; R. 329); the request was denied because (Ex. 392, R. 12994)—

> * * * contrary to Hartford's present and long-established policy of endeavoring to limit competition between its licensees within reasonable bounds, * * *.

B. OWENS

Owens was Hartford's principal partner in the conspiracy and was a direct party to most of the events to which we have referred.

The clear purpose of the 1924 Owens-Hartford Agreement was to stabilize the unpatented glassware market, restrict production, and exclude outsiders from the industry. Owens was given a veto power over the licensing by Hartford of manufacturers of unpatented glassware. A further purpose was to eliminate by concerted action other machinery manufacturers who were either

selling their machines outright or, if licensing, were undercutting Hartford royalties. Neither Owens nor Hartford was primarily interested in the rewards to which its patents entitled it, but rather in establishing control over the glassware industry. The parties frankly recognized that not only would Owens no longer compete with Hartford in connection with the licensing of gob feeders but that Owens and Hartford would divide the glass-making machinery business between them: Hartford to control gob feed and Owens to control suction.

The agreement, regarded as a partnership arrangement, gave Owens additional advantages over its competitors. Hartford shared with Owens one-half of all royalties in excess of $600,000 collected from Owens' competitors. Owens, moreover, was permitted the *free* use of 40 feeders and formers.

Owens' primary contention now is not that its conduct before 1935 was in compliance with the law but that it abandoned the conspiracy in that year. In our general discussion of the question of abandonment, *infra*, pp. 319–27, we shall show that Owens has continued to benefit by and participate in the conspiracy after the 1935 contracts.

C. HAZEL

Hazel contends that its agreements with Hartford and Owens in 1932 constituted a lawful

means of settling its patent controversies with Hartford; and that there was no evidence supporting the findings that Hazel cooperated with Hartford after the contracts were made.

1. Conduct apart from the agreements

Even apart from the agreements themselves, the evidence shows that Hazel and its officials participated in the conspiracy to eliminate competitors. Whether or not the agreements were valid on their face, this would in itself be sufficient to prove that Hazel had violated the law.

Hazel's insistence on receiving one-third of Hartford's net income (above $850,000) was expressly designed to place Hazel in a position not inferior to that of Hartford and Owens (R. 2374–5) in controlling the market for unpatented glassware. This provision for royalty-sharing was carefully concealed from the industry, notably in connection with Hartford's dealings with Brockway. (See p. 111, *supra*.)

Hazel reported to Hartford the activities of competing feeder manufacturers[22] and participated in Hartford's licensing policies.[23] Hazel

[22] Exs. 232–3, R. 12746; Ex. 925, R. 13577; Ex. 927, R. 13578.

[23] R. 2395; R. 2442–3; Ex. 155, R. 12675; Ex. 926, R. 13579; Ex. 954, R. 13601; Ex. 823, R. 13488; Exs. 206–7, R. 12732–3.

Hazel states (Br. 51):

"* * * the record does not show a single instance where McNash of Hazel, who was the Hazel spokesman to Hartford, ever asked Hartford to grant or refuse a license."

Exhibit 207 (R. 12733) is a letter from McNash to Smith dated July 31, 1928 stating:

agreed with Hartford, Owens, and Ball to restrict Hazel's fruit-jar production in order to get Ball into the fold. (See pp. 151–4, *supra*, 290–2, infra.)

"We certainly do not have any objection to Kerr's coming into the field. We would rather have them in than out.

"Our hope is that you can do something along this line."

Exhibit 589 (R. 13205) is a letter from McNash to Smith dated January 16, 1933, stating:

"In connection with Tygart Valley,—I had a conversation with Albert Algeo [of Hazel] on last Thursday. He seems to feel that Stewart [of Tygart Valley] is really again seriously considering a license. What worries him is damages.

"Possibly this represents a chance for Brown [of Hartford] and Stewart to get together, as I believe Brown is concerned very much about Stewart's cup feeder. This rather makes it necessary for Brown to see Stewart before someone with a different view than our own sees him. Albert seems to feel that some recognition of the value of this cup feeder in connection with damages, would do the trick.

"* * * Ed Stewart is finally coming around again. He has had one or two conversations with Algeo and I think Albert has satisfied him that he, (Stewart), does not really know anything about patents,—which is absolutely true."

Hazel also asserts (Br. 49) that McNash "paid no attention" to the letters written by a vice president of Hazel's Pacific Coast subsidiary complaining regarding the conduct of its competitors. But McNash, in replying to such letters (Exs. 954, 956, R. 13601, 13603), said (Ex. 823, R. 13488):

"I did talk to William Levis about these subjects and find that Maywood is not going to get a license for jugs and that Hartford was going to cease to use the opinion of manufacturers on the Pacific Coast as an excuse for doing or not doing anything.

"The Northwestern situation is one of point of view. I never have been much of a believer in anyone's ability to put someone else out of the glass business. If that premise is correct, then the thing to do is to have your competition on the same basis you are,—that is, with the Hartford-Empire license, paying their royalty and so on. Then you know

That Hazel was in accord with the Hartford and Owens policy to use the Hartford licensing system as a means of stabilizing the industry appears from Hazel's willingness to relieve Hartford of the requirement in the 1932 contract that Hartford put the validity of its patent in issue outside of the Third Circuit; Hazel granted Hartford an extension as to this when advised that the effect of an adverse decision on the patent might be to upset "the entire apple cart to the detriment of all parties concerned" (Ex. 162, R. 12678–9) and that this "might destroy the very situation Hazel desired" (Ex. 165, R. 12682). (See pp. 108–9, *supra.*) An object of the 1932 supplemental agreement between Hartford, Owens, and Hazel as stated by Carter in his contemporaneous memorandum (Ex. 141, R. 12673) was "to take care of the contingency that by some outside influence or decree, governmental or otherwise," Hazel or Owens should be unintentionally deprived of its right to participate in Hartford's net income.

2. The agreements were invalid

It is submitted, moreover, that the General License Agreement (Ex. 142, R. 8764) in and of

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they have to get a reasonable price. I really cannot find any objection to Northwestern's having a license.

"You might discuss some of these things with William Levis when he is in California the latter part of this month." Cf. Ex. 944, R. 13592 in which McNash wrote Levis on September 1, 1932 that he would do everything he could to induce Ball to take a license.

itself was in direct contravention of the antitrust laws. It was designed, through the guise of patent licensing, to place and maintain Hazel in a dominant position over its competitors (other than Owens) in the manufacture and sale of unpatented glassware. The outstanding provision in this respect is the royalty-sharing clause allotting to Hazel one-third of the net income over $850,000 received by Hartford from the royalties of Hazel's competitors. The other two-thirds was shared equally between Hartford and Owens. Some idea of the extent of the competitive advantage realized by Hazel under this provision may be obtained from the fact that it received $10,034,030 under this provision from the date of the contract through 1940 (p. 107, footnote 58a, *supra*). Through its royalty system, Hartford had current knowledge of the production of its licensees (R. 1272). It would appear that Hazel and Owens, being entitled to share in Hartford's royalty income, were in a position to obtain much information about the activities of their competitors (cf. R. 2607; Ex. 226, R. 12748). A patentee is not entitled to secure the profit from the patent monopoly by using the patent to protect others from competition. *United States* v. *Univis Lens Co.*, 316 U. S. 241; *Ethyl Gasoline Co.* v. *United States*, 309 U. S. 436; *Slayter & Co.* v. *Stebbins-Anderson Co.*, 31 F. Supp. 96, 107 (D. Md.), affirmed on other grounds, 117 F. (2d)

848 (C. C. A. 4); cf. *Interstate Circuit, Inc.*, v. *United States*, 306 U. S. 208, 230 (copyright).

Other provisions of the agreement were also unlawful. Section 3A (Ex. 142, R. 8767) provided that if Hazel used nonlicensed inventions to produce more than one-fifth of its glassware, Hartford's payments to Hazel were to be reduced by two-thirds of the royalties that would have been payable on the nonlicensed production in excess of one-fifth of its glassware. The royalties so payable were to be divided equally between Owens and Hartford. The consequence of this was to subject Hazel to the payment of royalties with respect to production on nonlicensed machines; this was clearly illegal as an attempt to extend Hartford's patent monopoly beyond the scope of its patents. (See cases cited *supra*, p. 250.)

There was also a clause (Ex. 142, Section 7, R. 8772) requiring that if Hartford entered the glass manufacturing field, it should pay itself royalties, two-thirds of which would have gone to Owens and Hazel; the object of this was to discourage Hartford from engaging in the manufacture of glassware (Ex. 226, R. 12749–50).

Sections 1 and 3 of the Agreement (Ex. 142, R. 8766–7), as they read, required Hazel to pay Hartford royalties even on Hazel's own inventions not covered by the Hartford patents. By Section 1 the term "Licensed Inventions" was defined to include all feeder and forming machine inventions

owned or controlled prior to January 4, 1945, *by either Hartford or Hazel*. Section 3 states that "Hazel-Atlas agrees to pay to Hartford royalties on all merchantable glassware manufactured by Hazel-Atlas, during the life of this Agreement, by the use of *any Licensed Invention*, at Hartford's Lowest Rates as defined below * * *." [Italics supplied.] Hartford has construed these provisions, in accordance with their language, as including Hazel's own inventions, and an arbitrator has upheld this literal construction over Hazel's protests.[24] The effect of these provisions, so construed, is to discourage Hazel from inventing machinery. That the patent laws do not justify a requirement that one company pay royalties for the use of its own inventions to another concern needs no argument.

Other illegal features of the agreement were the elimination of actual or potential competition between Hazel, Corning, Thatcher and other Hartford licensees holding exclusive rights in certain glassware fields which might otherwise have been open to Hazel. Similarly, the whole group of contracts was designed to maintain Hartford's domination in the licensing of gob feeder machinery and Owens' domination in the licensing of

[24] See Petition by Hazel-Atlas to set aside arbitrator's award. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, Civ. No. 4894, N. D. Ohio, W. Div. See also Ex. 226, R. 12748–9, where Brown of Hartford apparently so interpreted the contract.

suction machinery. (See pp. 105–6, *supra*). Hartford's domination in this respect was immeasurably strengthened by Hazel's acknowledgement in the General License Agreement of the validity of the Hartford patents, which resulted in most of the remaining independents promptly taking Hartford licenses. (See pp. 111–3, *supra*.) The division of fields of glassware carried into the 1932 agreements was similarly strengthened and perpetuated. (See pp. 103–8, *supra*.) Hazel's research and engineering facilities were made available to Hartford (Ex. 142, § 6, R. 8771) as assurance of continued control by the partners over the glassware industry through the patent dominance of one of their number. Finally, through the cross-license to Hartford, Hazel contributed its patents to the common pool (Ex. 142, § 5, R. 8770).

Hazel and Hartford both tried to justify the 1932 General License Agreement as a proper settlement of the patent litigation in which they were involved. That they had a right to enter into a settlement is, of course, undoubted. But as we have shown, *supra*, pp. 212–5, the right to settle does not mean that companies may make any kind of agreement they like, irrespective of the anti-trust laws. To the extent that provisions are included in a settlement agreement in order to restrain competition in an unpatented commodity, the agreement would be invalid. We think the

clauses of the agreement to which we have referred fall in that category. The rebate of one-third of Hartford's income from licensed inventions (above $850,000) to Hazel was a preference over other licensees which induced Hazel to cooperate in not disturbing the stability of the glassware market.

Appellants claim that these provisions of the Agreement are authorized by the decision of this Court in *Standard Oil Co.* (*Indiana*) v. *United States* 283 U. S. 163, upholding a settlement involving cross-licensing with preferential royalty treatment. In that case (which we have generally distinguished, *supra*, pp. 207–12) the patents of each of the companies concerned would have blocked the use of the other's inventions and the resulting deadlock would have obviously been harmful to the public. In such a situation, in which each patentee contributes to the pool a patent necessary for the commercial operation of the same machine or process, there may be circumstances in which there is good reason to allow each to give the others preferential treatment, *supra*, pp. 207–16. Appellants contend that that is the situation here, both because of the value of Hazel's own patents and because of a claim by Hazel based upon an agreement between it and Owens in 1909 and the Lott patents. We think the record demonstrates clearly that these were not the real reasons for the preference granted Hazel.

(*a*) *There was no patent deadlock.*—It is clear on the record that the Hazel patents were not infringed by Hartford to any such extent as to create a deadlock within the meaning of the *Standard Oil* case, *supra*. (See 283 U. S., at 171, footnote 5.) In order to create such a deadlock, each party must hold patents which dominate some part of the machine used by the other. If only one party holds patents dominating the machine of the other, there is a straight case of infringement, but no deadlock. There is nothing to prevent the holder of the dominating patent from making, using, and selling his machine. Exhibit 973[25] (R. 8032) shows that there were no interferences pending in the Patent Office between Hazel and Hartford during [illegible] months prior to the 1932 combination. Hazel did not contend in Hartford's infringement suits against Hazel and its subsidiary, Kearns-Gorsuch,[26] that Hartford infringed any patents owned by Hazel. There was, accordingly, no cross-conflict between Hartford and Hazel patents such as to "block technical advancement" within the meaning of the rule in the *Standard Oil* case.

Hazel's contention (Br. 30) that "the Hartford feeders infringe one of these patents" is

[25] Counsel for Hazel stipulated in the record that Exhibit 973 was correct (R. 2575).

[26] *Hartford-Empire Co.* v. *Hazel-Atlas Glass Co.*, 39 F. (2d) 111 (W. D. Pa.), reversed, 59 F. (2d) 399 (C. C. A. 3); *Hartford-Empire Co.* v. *Nivison-Weiskopf Co. et al.*, 58 F. (2d) 701 (C. C. A. 6).

not supported by the record. Hazel cites R. 6219, where appellant Brown testified as to a list of seven Hazel patents covering inventions which Hartford incorporated in its machinery. Brown testified that two of these, though "used with" Hartford feeders," were not "embodied in the Hartford feeder." The other five related to forming machines." The whole matter is set at rest, however, by the additional testimony of Brown (R. 6154):

> Q. Now, are there any other patents, other than those owned by Owens, which Hartford claims rights under and which cover in some respect the Hartford single feeder?
>
> A. No, I don't think there is any patent which has claims covering the Hartford single feeder, or any feature of it, except

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[27] R. 6220. One of these alleged Hazel feeder patents (No. 2,020,623) was not granted until over three years after the date of the 1932 agreements (Ex. HA–5080, fol. 21135, R. 16531), and, in the absence of interference in the Patent Office, cannot be presumed to have been in conflict with any Hartford patents.

[28] Three of these five patents relate to the No. 12 forming machine, which was not licensed until 1932, and not more than two of these machines have ever been used at the same time (Ex. H–5749, R. 15435). A fourth patent is used only in the Ed Miller machine, the licensing of which Hartford did not control until August 1933 (*supra*, pp. 129, 131–2), more than a year after the Hazel deal. Hence it could not be used to justify that contract. The fifth patent expired on April 4, 1933, which was about nine months after the 1932 contract (Ex. HA–5080, fol. 21135, R. 16531).

patents owned by Hartford and the patents we have mentioned owned by Owens."

Brown repeated the substance of this testimony immediately after giving the list of Hazel patents incorporated in Hartford machinery (R. 6220).

(b) *The claim as to Lott.*—Hazel contends, however, that it had a claim of infringement against Hartford under the Lott patent, which did create a deadlock, and is sufficient to justify the General License Agreement. That the parties did not take this claim very seriously appears from the following undisputed facts.

Since some time prior to April 9, 1924, Hazel had claimed that Owens had given it an exclusive license under the Lott patent for the production of wide-mouth ware by reason of a 1909 agreement between Owens and Hazel (Ex. O–5208, R. 12333).

Nevertheless, on October 20, 1923, Hazel apparently did not consider that it had rights from Owens under the Lott patents, since it was at that time *asking* Owens for a *non-exclusive* license under the Lott patents as consideration for Hazel's exclusive license to Owens under Brookfield (Ex. O–6001, R. 16076).

The 1909 contract granted Hazel exclusive rights under certain enumerated patents. At that time the Lott patents had not been issued.

[29] Hartford did not include any of Hazel's patents on its patent plates (Ex. H–6105, R. 11066).

The only clause of that contract on which the Hazel claim could be based is that under which Hazel was granted the benefit of all improvements later acquired by Owens "upon the inventions which are the subject of the Letters Patent, above enumerated * * *." (Ex. 0–5208, sec. 2, R. 12335). From the dates and titles of the enumerated patents, it is clear that they related to suction and not to the gob feed process which was the distinctive feature of the Lott patents.

In 1924, with knowledge of Hazel's claim, Owens granted Hartford an exclusive license under the same patents for all fields (Ex. 55, R. 8632, 8648). With knowledge of the fact that, if Hazel's claim were justified, Hartford could recover against Owens full damages suffered by reason of the resultant breach of warranty by Owens, L. T. Williams, Esq., Owens' chief counsel, advised his clients to warrant (R. 3768–9) to Hartford that it had not licensed anyone, other than Hartford, under the Lott patent. This was done (Ex. 55, sec. 29, R. 8643). Hartford did not learn of this claim before October 1924 (Ex. H–6112, R. 16255). In January 1926, Hazel prepared a proposed bill of complaint against Owens to enforce it (Ex. HA–5074, R. 14758). Neither this proposed suit nor any similar action was ever filed.[21]

[21] Hazel says (Br. 35) the complaint was never filed because all of its energies had to be devoted to contesting the suits on the Hartford patents. This ignores the fact that

Although Hartford had apparently learned of the Lott claim in October 1924, there was, so far as the contemporaneous documents show, no mention of it in all of the 1932 negotiations. If this claim had figured in the minds of the parties as justifying the execution of the agreement in order to prevent a deadlock, is it not likely that at least one of the following events would have occurred?

(1) F. G. Smith of Hartford would have mentioned the Lott claim in justifying to Falck on June 15, 1932, the surrender to Hazel of one-third of Hartford's divisible income. (See Ex. 140, R. 12660.)

(2) Carter would have mentioned the Lott claim as one of the advantages of the Hazel settlement in his report of the details to the Owens' directors on July 18, 1932. (See Ex. 141, R. 12671.)

Hazel's greatest asset in its fight with Hartford would have been the assertion of the Lott claim, as a counterclaim in one of Hartford's two suits, if possible, or at least as a separate countersuit against Hartford for infringement of the Lott patent. No such suit was filed. In view of the fact that Hazel's net profit in each year since 1925 has been in excess of $1,250,000 (Ex. 946, R. 7943–8), it is hard to regard seriously the contention that it did not have the resources or energy to retain competent counsel to try an action against Hartford in which "the validity and broad scope" of the patent in suit could not have been denied by the alleged infringer (see Ex. 55, sec. 9, R. 8637), or to try an action against Owens for breach of contract. It will be remembered that Hartford had acknowledged in the consent decree in the *Hamilton* case that its feeders infringed the Lott patents (pp. 51–2, *supra*)

(3) S. H. Philbin, Esq., counsel for Hazel, would have at least mentioned the Lott claim as supporting the legality under the antitrust laws, of the Hazel-Hartford license agreement when he wrote on July 8, 1932, to John W. Davis, Esq., for an opinion on this question. (See Ex. HA–5084, R. 14806–8.) [22]

(4) Hartford would have mentioned the Lott claim in writing to outside counsel for an opinion as to whether Hartford's promises to Ball and to Capstan, in effect to give them a license at Hartford's lowest royalty rates, were not broken by its failure to give each of them a share in its divisible income (Ex. 1772, R. 14263–4).

(5) The agreements between Hazel, and Hartford and Owens in 1932, which recited the consideration given by each party for the promises

[22] The opinion of Mr. Davis to which reference is made in Hazel's brief (p. 24) states (Ex. HA–5084, R. 14809):

"I understand that you wish my opinion upon the sole question whether the agreements into which you propose thus to enter with the Hartford-Empire and Owens-Illinois Companies are in violation of any of the anti-trust laws of the United States.

"I must judge the agreements on their face, since I have no information aside from the documents themselves as to the reason for their execution or their probable effect. I am assuming that there will not be, as a result of these agreements, any substantial decrease of competition between the parties, including their subsidiaries and licensees, and no decrease in competition by others. So considered these agreements do not in my opinion contravene any of the anti-trust laws of the United States."

of the other, would have mentioned Hazel's Lott claim.[32a]

But the fact is, as the record shows, that none of these things was done.

There were therefore in the instant case no "legitimately conflicting claims or threatened interferences" which were blocking technical advancement pursuant to the principles of the *Standard Oil* case (283 U. S. 163, 171 and n.). On the contrary, the preference granted was to insure domination of, and the elimination of competition in, the glassware industry, and "the available advantages" were not "open on reasonable terms to all manufacturers desiring to participate." Hence, the 1932 agreements cannot be brought within the protection of that case.

Hazel did not have to enter into those particular contracts; it cannot be heard to say that the license could not be obtained on terms other than those to which Hazel agreed.[33] *United States* v. *Masonite Corp.*, 316 U. S. 265; *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U. S. 20, 36; *United States* v. *Motion Picture Patents Co.*,

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[32a] Ex. 142, Sec. 5, R. 8770; Ex. 148, Sec. 1, R. 8813–4.

[33] It was after this agreement had been made that Hazel abandoned its application for rehearing, which it had had five times extended, and determined not to petition for certiorari in *Hartford-Empire Co.* v. *Hazel Atlas Glass Co.*, 59 F. (2d) 399 (C. C. A. 3). (See the recent opinion of the Third Circuit on the application to vacate this decision, 137 F. (2d) 764, pending on certiorari, No. 398.)

535890—43——19

225 Fed. 800, 810, 811. Of a similar argument, the court said in *Delaware & A. T. & T. Co.* v. *Delaware,* 50 Fed. 677, 679 (C. C. A. 3) that if the license could not have been so obtained, "it could have been declined." Cf. *National Harrow Co.* v. *Hench,* 83 Fed. 36, 38 (C. C. A. 3).

D. LYNCH AND THE FORMING MACHINE CONSPIRACY

1. Hartford and Owens aided Lynch to eliminate competition through the acquisition of Ed Miller

Lynch's acceptance of the financial aid of Hartford, Owens, Levis, and H. R. Collin for the acquisition of Ed Miller, as a step in the fulfilment of the desire of "all parties * * * to corner the forming machine business,"[34] would alone be ample to connect Lynch with the conspiracy and subject it to responsibility for all acts of its co-conspirators in furtherance thereof. Other facts showing that Lynch was an active participant in the forming machine conspiracy are that Lynch, in consideration for this aid, agreed to keep out of the feeder and suction machine fields, that there was actual as well as potential competition between Lynch and Ed Miller prior to the acquisition, both in the narrow-neck and wide-mouth

[34] Appellant Brown quoted this statement as having been made by appellant McMurtrie of Lynch at a Hartford-Lynch conference (Ex. H–6048, R. 16170).

forming machine fields,[35] that Lynch "materially" raised the prices of the Ed Miller machines promptly after the acquisition (Ex. 1046, R. 13695),[36] and that no significant competition in forming machines thereafter existed.[37]

In asserting that "no plan or suggestion was carried out other than the written agreements" (Br. 16), Lynch ignores the following statement

[35] There can be no question but that both actual and potential competition between Lynch and Ed Miller in the manufacture of forming machines existed at the time of the acquisition. Werbe, president of Lynch, testified that the Lynch machines could be and were used in the manufacture of wide-mouth ware (R. 2698) and that from 3 to 5% of the total container production is wide-mouth ware made on narrow-neck machines (R. 2847). Since sales of glass containers in 1933 exceeded $100,000,000 (U. F. 314, R. 7345), the sales of wide-mouth ware made on narrow-neck machines, on the basis of Werbe's estimate, ran from at least $3,000,000 to at least $5,000,000, which certainly represents a substantial amount of competition. It is, moreover, axiomatic that it is the character of the restraint and not the amount of commerce affected which renders the restraint illegal. *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 485; see *United States* v. *Union Pacific R. Co.*, 226 U. S. 61, 88; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225, footnote 59. There was also potential competition between Lynch and Ed Miller in the manufacture of narrow-neck machines (*supra*, p. 126).

[36] The power obtained by Lynch, through its acquisition of Miller, to raise prices and the subsequent exercise of that power violated the Sherman Act under familiar principles. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 224, 226, footnote 59.

[37] F. 345–4, R. 7350; Lynch Br. 9–10; R. 3078; R. 6776–8; R. 6785–7; R. 6792–3; Ex. 1217, R. 13813; Ex. 2012, R. 14659; Ex. 2013, R. 14660.

of appellant McMurtrie to appellant Brown (Ex. H–6048, R. 16170):

> * * * Mr. McMurtry [*sic*] also outlined the present attitude of the Lynch Corp. as follows:
>
> 1. All parties agree that it is desirable to corner the forming machine business.
>
> 2. The Lynch Corp. is willing to cooperate if they can get a reasonable break assuring them of a future volume of business.
>
> 3. The Lynch Corp. does not consider a mere patent situation sufficient to justify holding down its business to Hartford licensees, because Lynch can fight patent interferences and suits for years, do business in the meantime, and hope that during the fighting period somebody will get up a feeder that is free of Hartford's patents.
>
> 4. Lynch has made connections assuring financial support for future fights, both in the way of money support and a contribution of legal talent * * *.

2. *The Forming Machine Agreement was illegal*

(*a*) *The Forming Machine Agreement was illegal under the Sherman Act.*—Appellant Lynch argues (Br. 40–53) that the Forming Machine Agreement of August 23, 1933 (Ex. 330, R. 9067), was a legal cross-licensing agreement necessary to avoid a patent deadlock and fell within the protection of *Standard Oil Co.* v. *United States,* 283 U. S. 163. The requirements of that decision,

however, were not met. In stating (p. 171) that an interchange of patent rights might promote rather than restrain competition "if the available advantages are open on reasonable terms to all manufacturers desiring to participate," this Court implied that such interchange could not be justified when, as here, competition is restrained through failure so to open the available advantages. Glassware manufacturers not having Hartford feeder licenses were placed at a prohibitive disadvantage by the necessity, under sections 3 and 5, of paying for a forming machine license the same royalties which Hartford feeder licensees paid for their feeder and Lynch forming machine licenses combined.

Surely nothing in the *Standard Oil* decision could justify the provisions of section 8 of this agreement, which gave Lynch the right to an indemnity of $3,000 for every machine Hartford might sell in excess of those having an aggregate capacity of over 40% of that of all machines delivered by both Hartford and Lynch. As an agreement for sharing the market, this section was clearly illegal. *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, affirming, 85 Fed. 271 (C. C. A. 6); *Lee Lines Steamers, Inc.* v. *Memphis H. & R. Packet Co.,* 277 Fed. 5 (C. C. A. 6).

Under the Forming Machine Agreement manufacturers were required to obtain a Hartford

forming machine license before they could purchase a Lynch forming machine; the Hartford forming machine licenses contained all the restrictions as to types of ware, protecting the fields allotted to Corning, Thatcher, Ball, and other leading manufacturers, which were customarily inserted in the Hartford feeder licenses. (See pp. 164–72, 134, fn. 2, *supra.*) The imposition of such restrictions upon the use of Lynch machines after title to such machines had passed from Lynch to its customers was, therefore, inherent in the Forming Machine Agreement. Lynch's imposition upon its customers of the condition that they obtain a Hartford forming machine license, involving these restrictions, was an attempt to impose the burden of the Hartford patent monopoly upon the machines after title had passed, in violation of the principle enunciated in *United States* v. *Univis Lens Co.,* 316 U. S. 241, 249; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 457.

(*b*) *The Forming Machine Agrement tied together formers and feeders and was therefore illegal under the Clayton Act.*—The district court concluded (Concls. 65–6, R. 7415–6) that the Forming Machine Agreement violated Section 3 of the Clayton Act[38] because it involved, in practi-

[38] 38 Stat., § 731, 15 U. S. C. A., § 14, which provides as follows:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery,

cal effect, a tying clause which prevented lessees of Hartford feeders from acquiring any other feeder for use with Lynch forming machines. The Forming Machine Agreement was at first interpreted by both Hartford and Lynch to prohibit the sale of Lynch machines to manufacturers not having a Hartford feeder license. When this interpretation was modified so as to prohibit sale only to manufacturers who did not have a Hartford forming machine license, the situation was not altered in substance because Hartford required manufacturers to pay for a forming machine license the same royalties which would be payable under a feeder license, while at the same time exempting such manufacturers from any forming machine license royalties in the event that the forming machine was to be used with a licensed Hartford feeder. By this means it was made economically prohibitive for a manufacturer

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supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

to obtain a Lynch forming machine without also taking out a Hartford feeder license. (See p. 134, *supra*.) The Hartford feeder licensee, moreover, was precluded from obtaining other feeders from any competitor of Hartford, since to do so would have required it not only to pay for the new feeder but also to pay to Hartford the full feeder royalties under the forming machine license.

Clauses of the sort embodied in the Forming Machine Agreement are commonly known as "tying" clauses; and the rule was early established that such clauses are to be construed by their effect as well as by their terms. *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451. It was held in that case that the imposition of penalty royalties, like those payable for a forming machine license in the instant case, was illegal under Section 3 of the Clayton Act as, in effect, a condition that the lessee should not deal in the commodities of a competitor of the lessor. Accord: *Oxford Varnish Corp.* v. *Ault & Wiborg Corp.*, 83 F. (2d) 764 (C. C. A. 6). It is clear that a violation of section 3 is not avoided by the absence of an express prohibition against dealing in competitors' goods. *International Business Machines Corp.* v. *United States*, 298 U. S. 131. It is enough that the agreement obviously tends in that direction. *Carbice Corp.* v. *American Patents Development Corp.*, 283 U. S. 27. The courts have liberally construed this section in order to effectuate the

purpose for which it was enacted. (See Oberdorfer, *"Tying Clauses" and the Patent Monopoly* (1941), 7 Oh. St. L. J. 210; Wood, *Patents and Antitrust Law* (1942), 63 *et seq.*)

The evidence shows that Hartford desired to enlarge its feeder monopoly by combining with Lynch to control the complementary forming machine.[39] The effect of this agreement was to exert pressure on manufacturers to take Hartford feeder licenses,[40] and also, as noted by Safford of Hartford (Ex. 320, R. 12886), to take from prospective newcomers in the industry "the incentive to build feeders that might be used with Lynch machines." Newcomers could not qualify under Hartford's undertaking to negotiate forming machine licenses only "with any reputable glassware manufacturer" (Ex. H-5110, R. 14816).[41] The inevitable effect of the agreement was therefore substantially to lessen competition of other manufacturers with Hartford (R. 2730-1) and to create monopolies of both feeders and forming machines.

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[39] Use of one monopoly to support and extend another is illegal. *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436.

[40] Cf. Ex. 338 (R. 12910) with Ex. 1618 (R. 9358); Ex. 1077 (R. 13720) with Ex. 1636 (R. 9450).

[41] For examples of newcomers whose difficulties were enhanced by the Forming Machine Agreement, see Exs. 1087-90 (R. 13727-9); Exs. 1098-9 (R. 13734); Ex. 1105 (R. 13738).

Lynch and Hartford thought they had circumvented the Clayton Act by the form of the arrangement, since there was no lease or sale of forming machines by Hartford, for the benefit of which the tying clause condition was imposed (Ex. 324, R. 12899). It is submitted, however, that immunity cannot be so easily achieved. There was a lease of *feeders* by Hartford; and the effect of the tying clause was to prevent the lessee from using the feeders of Hartford's competitors.

In paragraph 1 of the contract involved in *Lord* v. *Radio Corp. of America,* 24 F. (2d) 565 (D. Del.), affirmed, 28 F. (2d) 257 (C. C. A. 3), certiorari denied, 278 U. S. 648, RCA, the patent holder, licensed others to manufacture and sell radio receivers; and in paragraph 9 licensed them to use and sell radio tubes purchased from itself. It agreed in the same paragraph to sell, and the licensees agreed to buy, such tubes for use in the receivers licensed under paragraph 1. The district court (p. 566) rejected the argument that the act did not apply to a mere licensor and held that the agreement to sell the tubes was a subordinate contract of sale within the terms of the Clayton Act. The purchaser did not agree not to use tubes of any competitor of RCA any more than the lessee of Hartford feeders agreed not to use feeders of Hartford's 'competitors; but the purchaser of tubes from RCA agreed to use

them only in licensed radio receivers and, having the tubes on hand, was economically precluded from using the tubes of others. Similarly, as we have already seen, the Hartford feeder lessee was economically precluded from using feeders of any competitor of Hartford.

If Hartford violated the Clayton Act through its feeder licenses and leases when considered in conjunction with the Forming Machine Agreement, Lynch, as a party to the agreement which contemplated this system, is also liable for this violation. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253–4.

The parties recognized by the Forming Machine Agreement that the Lynch forming machine embodied Hartford's own and acquired inventions and was in effect the joint creation of Hartford and Lynch. Lynch, in part consideration for the use of Hartford's patents, in effect, agreed, as we have seen, not to sell the forming machines to persons who either did not possess a Hartford feeder license or were unwilling to pay Hartford's feeder royalties for a forming machine license. Hence, the forming machines should be regarded, for the purposes of the Clayton Act, as the joint property of Hartford and Lynch. In this view, the Clayton Act was clearly violated by the sale of the Hartford and Lynch forming machines upon condition that the purchaser pay an exorbitant royalty if he used any but a Hartford feeder.

Motion Picture Patents Co. v. *Universal Film Mfg. Co.*, 235 Fed. 398 (C. C. A. 2), affirmed on other grounds, 243 U. S. 502; *Barber Asphalt Corp.* v. *La Fero Grecco Contr. Co.*, 116 F. (2d) 211 (C. C. A. 3).

E. HARTFORD AND OWENS AS TO LEHRS

In 1928 Hartford was having brisk competition from Amsler-Morton Company in the lehr business (R. 1871). Hartford licensed and leased its lehrs under restrictive agreements (Ex. 580, R. 9213; Ex. H–5749, R. 15435), whereas Amsler-Morton sold lehrs outright (R. 1870). Having failed to make a satisfactory arrangement with Amsler-Morton in 1928 (R. 1874) and the feeder and former situations having been stabilized by the end of 1933, F. G. Smith, of Hartford, complained in 1934 to his fellow directors, Falck and Amory Houghton, of the existing lehr competition (Ex. 577, R. 13188).

Early in 1934 appellant, Harry Collin, a director of Owens, visited Amsler-Morton and suggested that that company sell out its lehr business, but the offer was declined (R. 1875). A month later Collin, accompanied by a representative of Simplex Engineering Company, another manufacturer of lehrs, and the late B. F. Hazelton, Jr., vice president and director of Owens (Owens Ans. par. 20, R. 178) again visited Amsler-Morton and suggested that Amsler-Morton sell out to a company for a substantial price. Hazel-

ton stated that the new company would get all the new business from Owens and others and necessary rights from Hartford. The Amsler-Morton people said that they wanted to think it over, and Hazelton, as he was leaving, stated (R. 1877):[42]

> We will give you a month to think it over * * * but if you do not go on with us, you are going to be sued, and continue to be sued until you are out of business * * *. *It is our plan that nobody in the glass industry is going to be allowed to own one piece of equipment.*[43] [Italics supplied.]

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[42] Neither Frazier nor Collin was ever asked by Hartford or Owens to deny on the stand or modify in any way Geer's testimony concerning the remarks at these conferences of Hazelton and Collin of Owens. Collin testified in other connections (R. 2526–36).

In *Interstate Circuit* v. *United States*, 306 U. S. 208 (1939), an antitrust case, the Court said, p. 226:

"The failure under the circumstances to call as witnesses those officers who did have authority to act for the distributors and who were in a position to know whether they had acted in pursuance of agreement is itself persuasive that their testimony, if given, would have been unfavorable to appellants."

[43] Owens contends (Br., App. xiii) that Hazelton's testimony "patently indicates that Hazelton was speaking for himself and in no wise for Owens." Hazelton had been entrusted by Owens with major responsibilities in the conduct of its corporate affairs (R. 2205; Ex. 744, R. 13436; Ex. 1252, R. 13835). He handled the negotiations for the purchase by Owens of O'Neill (R. 2171) and approved with Levis the purchase of the Lynch suction patent rights (Ex. 743, R. 13435).

Hazelton told Geer that if the proposed combination were carried out he would see that the new company "got all of the tank business of the Owens-Illinois Glass Company and

Within three or four months Hartford filed two suits against a purchaser of machines from Amsler-Morton. Owens assisted Hartford in obtaining evidence to be used in this suit (Ex. 764–9, R. 13448A–51).[44] The suit was successful, and since then Amsler-Morton has been out of the lehr business and Hartford has been the predominant distributor of lehrs (*supra*, pp. 138–9).

The significance of the above facts is that it was Owens which was seeking to force the competing lehr manufacturer into the Hartford system and that the primary purpose was to prevent any glassware manufacturer from owning any glassware machinery.[45] This demonstrates that as to lehrs, as well as other machinery, Hartford and Owens were acting in combination to control the industry.

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other companies," as well as "the rights to build all of the Hartford lehrs" (R. 1877). Owens could not be expected to give its business exclusively to the combined Simplex-Amsler-Morton Company on the mere personal request of Hazelton. The nature of this statement in itself reveals that it had been authorized by Owens.

[44] Owens says (Br., App. xv) that the information furnished Hartford could have been obtained by subpoena. The fact is that it was not, but was given voluntarily at a time when the parties were in close business relationship. Besides, Owens did not hesitate to refuse similar information to Lynch (Exs. 656–61, R. 13324–8; Exs. O–5041–7, R. 14736B–41).

[45] If this had been an isolated transaction, it might not have been improper for Hartford itself to have asserted its patent as against an alleged infringement.

The facts as to the milk bottle conspiracy have been set forth in the Statement (*supra,* pp. 139–46). They show that Thatcher and Owens bought out most of their competitors in the milk-bottle field, and that Hartford both limited the number of milk licenses it would grant to outsiders and restricted the number of bottles which could be made by those firms which it did license.[46]

The object of these transactions was to protect Thatcher and Owens from competition and also to avoid price cutting. That the parties did not themselves regard these restrictions as required by any exclusive license [47] appears from the letter written by F. G. Smith, of Hartford, in 1934 (Exhibit 246, R. 12770):

> We have not been legally prohibited from licensing single feeders for milk bottles to anybody we saw fit, but during all these years we have protected Thatcher and Berney Bond [owned since 1930 by Owens] and Buck by refusing to grant additional licenses for milks. This action on our part

[46] The quantity of milk bottles which Knox was permitted to make was so limited that the company was forced to sell its milk bottle business to Thatcher. (See pp. 144–5, *supra*)

[47] Thatcher had an exclusive right to use the Hartford milk bottle forming machine, but competitors could get along without that (Ex. H–5750, R. 15436). As the letter quoted in the text showed, Thatcher had no exclusive right to use the Hartford single feeder for milks, although it was as to this machine that the restriction was imposed.

> has stabilized the price situation and has been worth hundreds of thousands of dollars to Thatcher. It would have been a very simple thing for us to decentralize the production of milks throughout the country.

That such conduct is illegal needs no further demonstration. (See pp. 248–253, *supra*.)

G. BALL

1. Ball's aim to dominate the production of fruit jars is manifested by its acquisition of competing manufacturers both before and after it obtained a Hartford license in 1933.[44] In its negotiations with Hartford it insisted upon as exclusive a license as possible. As in the case of Thatcher in the milk-bottle field, Hartford had been using the power of its license system to reserve the fruit-jar field for Ball. F. G. Smith wrote Ball on December 30, 1932 (Ex. 181, R. 12707):

> * * * we are continually declining new business in the belief that an association with your Company would be more beneficial to us than to take our fruit jar rights and license a number of concerns. The easiest thing we could do would be to license Kerr, Brockway, Underwood [Knox], Monaca, and five or six more concerns * * *.

[44] Schram Glass (U. F. 366, R. 7354); Pine Glass (U. F. 367, R. 7355); Knox (U. F. 377, R. 7356); Brockway (U. F. 379, R. 7357); Gayner (U. F. 380, R. 7357); Three Rivers (*supra*, pp. 156–157).

By refusing Brockway a license for fruit jars (U. F. 378, R. 7357), Hartford promoted the acquisition of Brockway's fruit-jar business by Ball. The residual license obtained finally left in the field only Owens, Hazel, and Kerr.

Subsequent to the agreements of 1933, Ball made full use of Hartford's licensing system in an effort to restrict the competition to these companies.[49] It continuously kept after Hartford because of price cutting by unlicensed manufacturers and the production by licensees of packers'

[49] Owens states (Br. 82):

"In addition to the unrestricted (and obviously successful) competition from Ball and Hazel, Owens at the time of the trial was meeting competition in the fruit jar field from at least 8 other producers" [citing Ex. H–5750 (R. 5733, 15436–50)].

This statement is plainly wrong. In the first place, Exhibit H–5750 (R. 15436–50) does not show anything as of the time of trial. This exhibit is an analysis of the ware which each Hartford licensee was permitted to make at any time from November 27, 1916, to October 8, 1940, when Hartford wrote its feeder licensees "that it was removing all restrictions and exclusions from the 'Permitted Ware' schedules" (Ex. H–5750, R. 15450).

Secondly, Owens did not controvert in its appeal papers (R. 7793–7), Finding of Fact No. 391 (R. 7359) which reads in part as follows:

"Other than Kerr, there has been no other manufacturer [besides Ball, Hazel, and Owens] regularly engaged in the production and sale of fruit jars since May 11, 1933."

Ball (Br. 18) in effect concedes that this finding is correct, and it did not controvert it in its appeal papers (R. 7870–81), nor did Hazel (R. 7793–7). The record also shows that after October 8, 1940, Florida Glass Manufacturing Co.

ware which Ball throught was being sold to the domestic fruit jar trade. These activities were directed at the elimination of competition in an unpatented field and were clearly illegal.

2. In addition to the above, the district court found [50] that in order to induce Ball to take out a Hartford license, Owens and Hazel assured Ball, by way of a gentlemen's agreement, that they would limit their fruit-jar production. This finding is supported by the evidence, despite the denials of the principal parties, which the trial court obviously did not believe. The evidence is reviewed fully in the Statement, *supra*, pp. 151–4, and in the interests of brevity we will not summarize it here. Of particular significance, we believe, is the testimony of Levis of Owens and McNash of Hazel, hostile witnesses, that F. C. Ball had admitted the existence of such an understanding (R. 2155, 2427). It is also of importance that Ball paid $400,000 for its license from Hartford, $112,000 for the fruit-jar business of Knox with an agreement by Knox to keep out of the business for 15 years, $150,000 for the fruit-jar business of Brockway with a similar agreement and $30,000 for the fruit-jar business of Gayner.

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made or sold on Hartford feeders about 30,000 gross of packers' jars having the G. Mason finish; *i. e.*, capable of being used both by a packer to be filled with his product and by the housewife for canning (R. 6729).

[50] F. 383, R. 7358; cf. the discussion in the opinion below (Op. R. 78–84).

It cannot be reasonably assumed that Ball would have thus expended some $700,000 in cash to strengthen its position in the fruit-jar field unless it had received satisfactory assurances limiting the potential competition of Owens and Hazel, the two largest glass container manufacturers and two of the three largest fruit jar producers (other than Ball).

Even with conflicting testimony (principally that of appellants F. G. Smith, McNash, Levis, Brown, and G. A. Ball) the finding of the district court, which saw and heard the witnesses, should not be set aside upon appeal where, as here, there is ample evidence to support the court's conclusions. *Butte & Superior Copper Co., Ltd.*, v. *Clark Montana Realty Co.*, 249 U. S. 12, 29–30; cf. F. R. C. P. Rule 52 (a); *Malloy* v. *New York Life Ins. Co.*, 103 F. (2d) 439, 443–4 (C. C. A. 1), certiorari denied, 308 U. S. 572.

Concerted action may be inferred from a series of acts following a proposed plan and no agreement is necessary for proof of a violation of the Sherman Act under such circumstances. It is enough that "knowing that concerted action was contemplated and invited," the appellants "gave their adherence to the scheme and participated in it." *Interstate Circuit, Inc.*, v. *United States*, 306 U. S. 208, 226. The inference arising from the course of conduct of the appellants stands in place of a formal agreement. *Eastern States Retail*

Lumber Dealers Assn. v. *United States*, 234 U. S. 600, 612.

H. THE GLASS CONTAINER ASSOCIATION

1. *The Association was used to limit production and exclude newcomers from the industry*

As a trade association organized by the glass-container manufacturers and including among its members all of the corporate defendants except Corning and Empire, representing 96% of the country's glass-container production, the appellant Association naturally became a channel through which the purposes of the industry, as organized under the Hartford system, were effectuated. Appellants were heavily represented on its board of directors and from 1933–1938 had five representatives on the statistical committee of seven. From 1939–1942, the committee consisted of five members, *all* of whom represented appellants in this case (Ex. 1714, R. 14138). It was this committee that carried out the policy of "live and let live" through the dissemination of production quota forecasts.[51] The Association was a meeting place and breeding ground for appellants' illegal con-

[51] "Percentage forecast" and "quota" were the terms applied interchangeably by the members of the Association (R. 3534) to the percentage of the estimated total shipments of all members for each month and for the "moving year" which it was "forecast" would be shipped by each member for the corresponding periods (R. 3529–30; Ex. 600, R. 13211). These forecasts were inserted in the monthly reports in order

spiracies (cf. R. Op. 92).[52] It was an instrumentality through which appellants might carry out repressive schemes which the law would not permit them to engage in directly. These facts, coupled with the proved instances of the Association's cooperation with the conspiracy to keep newcomers out of the industry[53] and to limit capacity[54] and production[55] are ample to connect it with the general conspiracy and to render it liable for the acts of all conspirators in furtherance thereof. (*McCandless* v. *Furland*, 296 U. S. 140, 164–5; *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208, 226–7.)

The quota system was in all essential respects analogous to the plan found to be illegal in *Amer-*

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to implement appellant Stevenson's principle of market sharing (R. 3534; 3536). Appellant Ackerman described this principle as part of "a policy of 'live and let live'" (ibid.).

[52] At least two of the major matters complained of in the instant suit had their inception at meetings of the Association. Levis, McNash and Root took up with Collins at an Association meeting at White Sulphur Springs in the summer of 1932, the surrender by General of its fruit jar rights in order to help Hartford induce Ball to accept a Hartford license (R. 2146). The following spring at another meeting of the Association at White Sulphur Springs, Levis and Werbe had a conversation which led to negotiations culminating in the August 1933 forming machine deals (R. 2746–7).

[53] It successfully cooperated with Hartford to this end (footnote 40, *supra*, p. 158).

[54] It cooperated with Thatcher, Hartford, Owens and Hazel to discourage Knox from increasing its capacity (footnote 39, *supra*, p. 158).

[55] This resulted from the enforcement of its policy of market sharing (*supra*, pp. 158–162).

ican Column and Lumber Co. v. *United States,* 257 U. S. 377. The following language of that opinion is peculiarly appropriate to the facts here under consideration (p. 399):

> The sanctions of the plan obviously are, financial interest, intimate personal contact, and business honor, all operating under the restraint of exposure of what would be deemed bad faith and of trade punishment by powerful rivals.

The facts here do not bring the case within *Maple Flooring Association* v. *United States,* 268 U. S. 563, *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, or *Sugar Institute, Inc.* v. *United States,* 297 U. S. 553, in which it was said that the gathering and dissemination of information as to market conditions is not in itself an illegal restraint of commerce where, as expressed in the *Maple Flooring* case at p. 583:

> The manufacturer is free to produce, but prudence and business foresight based on that knowledge influence free choice in favor of more limited production.

The exchange of individual forecasts at committee and Association meetings[56] and the applica-

[56] The Association contends that there was no disclosure of the figures of one company to another, "except to the extent that members may voluntarily exchange this information" (Br. 12). Appellant Ackerman, its assistant business manager, testified that up to 1931 "members of the Statistical Committee, at their meetings would pass around to each other their individual figures" (R. 3577); and that from 1931

tion of moral "sanctions" by powerful manufacturers, who were members of the statistical committee,[57] distinguish this case from those relied upon by the Association and bring it within the further language of the *Maple Flooring* case at p. 583:

> Restraint upon free competition begins when improper use is made of that information through any concerted action which operates to restrain the freedom of action of those who buy and sell.

Where, as here, there is concerted action through combination, the revealing by competitors of quota statistics to one another is forbidden. *United States* v. *American Oil Co.*, 262 U. S. 371, 390. It is a vehicle for the application of the moral sanc-

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until 1937, the practice was for each individual member of the committee who so desired to hand up the forecast figures to an officer of the Association, who then read at the meeting each member's forecast figures (R. 3578–9). From 1937 to July 1939, instead of reading each member's figures aloud, the practice was adopted of copying each member's figures on a single sheet of paper and distributing that sheet to everyone at the Committee meeting (R. 3579). Forecasts were also frequently exchanged at Association meetings (R. 2015).

[57] The district court found (F. 503, R. 7377) that the statistical reports were designed to limit, and in some instances did limit, production by members through threat of exposure of a deviation from its quota by each member and the resultant criticism (see footnote 42, p. 160, *supra*). These reports were compiled and disseminated under the direction of the Statistical Committee (Cf. R. 3530).

tions described in the *American Column and Lumber* case. Here, as in that case, there was—

> a systematic effort, participated in by the members of the Association and led and directed by the secretary [managers] of the Association, to cut down production and increase prices.

See *Maple Flooring Association* v. *United States, supra,* p. 580; *Sugar Institute, Inc.* v. *United States,* 297 U. S. 553, 600. Hartford, for example, was urged by Thatcher's chairman, Mandeville, a member of the statistical committee of the Association, not to license Liberty Glass Company to put a glass furnace in St. Louis on the ground that he is "over his forecast and we are under" (Ex. 432, R. 13054). In conditionally consenting on behalf of Owens to the extension by Hartford of the license of Laurens Glass Works, Levis, another member of the statistical committee, asked Hartford to suggest to Laurens that it get from the Association "a regular quota allowance on these new lines" (Ex. 1761, R. 14248, cf. Ex. 667, R. 13335).

The appellant Association (Br. 21) relies on statistics to prove that the quotas were not adhered to.[58] The effort to prove want of general adherence to quotas, however, becomes unimportant when it is indisputably proved that a number of the members did consider themselves bound by

[58] Ex. GCA–6084 (R. 16244); Ex. GCA–6087 (R. 16247); Ex. GCA–6089 (R. 16249); Ex. GCA–6091 (R. 16251).

these forecasts.[58a] Even if the plan had totally failed to accomplish its purpose of restraining production, the Association would still be responsible for having participated in the conspiracy to achieve such results. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225, footnote 59.

Of the charts relied upon, only Exhibit GCA–6084 (R. 16244), which purports to show the progress of small companies (i. e., those shipping less than 200,000 gross) shows a substantial divergence of sales volume from the trend of total industry volume. Exhibit GCA–6087 (R. 16247) shows that the sales volume of eight out of ten medium-sized companies varied in very close proportion to the variation in total industry volume, and

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[58a] See, e. g., Ex. 1504 (R. 13999); Ex. GCA–5295 (R. 14971); Ex. 667 (R. 13335); Ex. 1761 (R. 14247); Ex. 432 (R. 13054); Ex. 419 (R. 13037); Exs. 809–11 (R. 13478–80); Ex. 1857 (R. 14385); Ex. 1717 (R. 14153); Ex. 1720 (R. 14155); Ex. 793 (R. 13468). The frequent use of the word "quota" is in and of itself persuasive of the fact that the members regarded the forecasts as morally binding. The word is defined in Webster's *New International Dictionary* (2nd ed. 1942) as:

"A (certain) proportional part or share; the share or proportion assigned to each in a division or to each member of a body; as, the *quota* of troops and money required of a town; the sales *quotas* of a business house."

The word was used at least 25 times by different members of the Association in the exhibits listed above, including also Ex. 261 (R. 12809), Ex. 794 (R. 13468), and Ex. 1340 (R. 13917). Similar words, such as "allotments" (Ex. 419, R. 13038) and "allocation" (Ex. 1720, R. 14155) were also used.

Exhibit GCA–6089 (R. 16249) shows the same as to four out of six of the large companies.[59]

[59] The Association seeks to prove that the smaller glass manufacturers grew faster than the large between 1928 and 1939. The statistics offered for this purpose do not present the whole picture. They show the percentage gain between 1928 and 1939 of a certain selected group of those companies which in 1928 produced less than one million gross each, but they take no account of the many concerns which went out of business or were drawn into mergers. Since the production figures for such concerns in 1928 could not be compared with figures for 1939, they could not be and were not included in appellants' comparative computations. These companies were, of course, the ones principally affected by appellants' unlawful conduct. At least 22 of the smaller and medium-sized groups of manufacturers in business in 1928 no longer exist as independent concerns. Of these 22, about 12 were acquired by defendants in the instant suit. The fact is that the defendant manufacturers, with the possible exception of Hazel, grew to their present relatively enormous size largely by reason of their acquisitions of other manufacturers. A list of the acquisitions follows.

Illinois acquired by Owens in 1929 (Ex. H–5750, R. 15440), Pine acquired by Ball Brothers in 1929 (Ball Ans. par. 51, R. 251), Atlantic and Berney-Bond acquired by Owens in 1930 (Owens Ans. par. 78, R. 187–8), Hygeia acquired by Hazel in 1930 (Ex. H–5750, R. 15441), Illinois Pacific acquired by Owens in 1931 (*ibid.*), Root acquired by Owens in 1932 (Ex. 1765, R. 9509F), Hemingway acquired by Owens in 1933 (Ex. H–5750, R. 15442), Salem acquired by Anchor Cap (now called Anchor Hocking) in 1934 (Ex. H–5750, R. 15444), Peerless acquired by Thatcher in 1934 (Ex. 1849, R. 14378), Olean stock acquired by Thatcher in 1935 (Ex. H–5750, R. 15445), Three Rivers acquired by Ball in 1936 (Ex. H–5750, R. 15446), and Hocking (including the former General Glass, Turner, Monongah and Nivison-Weiskopf) acquired by Anchor Hocking in 1937 (Ex. H–5750, p. 12, R. 15447).

2. *The Association was used as a vehicle to establish a system of price leadership*

Hazel was the recognized price leader for wide-mouth containers (U. F. 127, R. 7328), Owens for narrowneck ware (*ibid.*) and Ball for fruit jars (R. 6545). Although the district court refused to make any finding of fact as to the method by which this system came into being, the evidence shows that, at least as to Owens, it was created in 1929 by the concerted action of representatives of Hazel, Owens and the Association. Appellant Stevenson's assistant, Fred Rummel (R. 3710), as the result of a meeting between McNash, Levis, and Whitall, members of the Statistical Committee, went to Toledo with Levis and then consulted with Hartley (another member of the committee) at Indianapolis, as a result of which they arranged for Owens to come out with a price list on all qualities and quantities, showing just exactly what it was getting for its products (Ex. 1505, R. 14000). This was clearly a concerted attempt to institute a system of price leadership.

In 1930, Levis reported to the Owens Board of Directors that its new prices were being maintained in all lines, "and a number of others in the industry have evidenced their appreciation of a stabilized market by following our lead" (Ex. 1853, R. 14381, see also Ex. 1855, R. 14382). Numerous price lists of Owens were found in the files of the Association (Exs. 1388–9, R. 13973–4; Exs.

1389A and B; fol. 53977; fol. 54160; R. 16531; Ex. 1731, R. 14161; Exs. 1731, A, B, and C, R. 14174–200). Appellant Ackerman, Assistant Business Manager of the Association, testified that he disclosed certain price lists to manufacturers (R. 3524–5).

I. THE INDIVIDUAL APPELLANTS

1. *Individuals associated with the corporate appellants*

There is sufficient evidence to connect each of the individual appellants with the conspiracy. Whether the liability of the individual appellants who are officers or directors of the corporate appellants depends upon their participation in a few or a number of the acts constituting the conspiracy, or whether liability is based on the fact that each of them has "authorized, ordered, or done any of the acts constituting in whole or in part such violation" (Clayton Act, Sec. 14, 38 Stat. 736, 15 U. S. C. § 24), the evidence discussed in the preceding sections of this brief, together with the uncontroverted findings relating to them makes it clear that appellants Smith[60] (U. F. 523–5, R. 7381), Brown (U. F. 530–1, R. 7382; U. F. 533–5, R. 7383), Safford (U. F. 544–6, R. 7385), Peiler (U. F. 539–42, R. 7384), Pease (U. F. 548–50, R. 7385–6), Eldred (U. F. 536–7, R. 7383; Ex.

[60] All of the individuals are identified in Appendix, Section X, pp. 447–53.

1363, R. 13935; F. 538, R. 7384), and Arkell (U. F. 527–9, R. 7381–2) actively participated on behalf of Hartford in all or many of the transactions found to have constituted violations of the antitrust laws. Appellants Falck (U. F. 551–4, R. 7386) and Amory Houghton (U. F. 555–6, R. 7387) similarly participated in the illegal transactions on behalf of Hartford, Corning and Empire, as did appellant William H. Curtiss (U. F. 558–61, R. 7387–8) on behalf of Corning. As conceded by Owens in its brief (p. 89), appellants Levis, Boshart, Belknap[62] and Collin similarly participated on behalf of Owens. Hazel concedes (Br. p. 62) that if Hazel violated the antitrust laws "it would be proper to find also that" McNash did. Appellants Werbe (*supra,* pp. 127, 133), McMurtrie (U. F. 608, R. 7397), and Bridges

[62] Owens in its brief (p. 59) states in connection with certain conduct of Belknap in December 1937: "While Belknap was a vice president of Owens, whatever he did in this connection [talking to Amory Houghton of Corning and I. J. Collins of Hartford and Anchor Hocking] was a personal matter," yet when the brief discusses the individual liability of Belknap (p. 101) a contradictory statement is made: "There is no suggestion that Belknap or Boshart ever acted otherwise than in a representative capacity."

The liability of Belknap is for the acts that he did, and any attempt to split his or any other individual's personality for the purpose of either avoiding liability on the part of Owens or avoiding liability on the part of the individual, ignores the realities of the situation; namely, that both the corporation and the officer will be held liable for the consequences of the acts done by the individual while an officer of the corporation and which are beneficial to the corporation as part of the conspiracy charged, and found.

(U. F. 607, 7397) were active participants on behalf of Lynch in effectuating the 1933 arrangements between Lynch, Hartford, and Owens. Defendant H. C. Mandeville, who died after taking his appeal (*supra,* pp. 139–46), and appellants Niver (U. F. 600, R. 7394) and Griffis (U. F. 605, R. 7396) were the principal actors on behalf of Thatcher. Appellant G. A. Ball (U. F. 612–13, R. 7398), and his brother, Frank C. Ball (*ibid.*) who died after taking his appeal, negotiated the various unlawful transactions on behalf of Ball. Appellants Stevenson and Ackerman were the active representatives of the Association in connection with their illegal activities (F. 616, R. 7398, *supra,* pp. 157–162).

No attack has been made upon most of the findings with respect to the appellants named in the preceding paragraph. As to a number of the other individual appellants, no argument has been made with respect to their individual responsibility as distinguished from that of the companies with which they were associated.[63] As to all of

[63] Theodore L. Champeau of Hartford (U. F. 547, R. 7385); Arthur L. Day (U. F. 566, R. 7389) and Arthur A. Houghton, Jr., of Hartford, Empire, and Corning (U. F. 557, R. 7387); Eugene C. Sullivan (U. F. 562, R. 7388) and J. L. Peden (U. F. 563–5, R. 7388–9) of Corning; E. F. Wellinghoff (U. F. 601, R. 7396), Jervis Langdon (U. F. 603, R. 7396), S. G. H. Turner (*ibid.*), F. H. Swan (*ibid.*), and W. H. Mandeville (U. F. 604, R. 7396) of Thatcher; A. G. Doll (U. F. 609, R. 7397), N. M. McCullough (U. F. 610, R. 7397), and J. L. Watts (U. F. 611, R. 7398) of Lynch.

the remaining individual appellants, except those considered in the following section, the findings and evidence supporting the lower court's decision are summarized in the Appendix, Section VII, pp. 430–433.

2. Appellants I. J. Collins, Fulton, Fisher, and Dilworth

(a) *The evidence.*—Although appellants I. J. Collins, Fulton, Fisher, and Dilworth were all officers or directors of Anchor Hocking, against which the complaint was dismissed, they were also all stockholders of Hartford and Collins had been a Hartford director. The complaint not only alleged that they had authorized, ordered and done acts alleged to have been performed by Anchor Hocking (Par. 25, R. 8), but also charged that all of the defendants were participating in the conspiracies and monopolies with respect to patents, machinery and glassware (Par. 34, R. 12). Collins admitted he had wanted prices "stabilized" all his lifetime (R. 2915); and in many different capacities since 1906 was proved, with the assistance of Fulton and sometimes of Fisher, to have sought such stabilization through mergers, the elimination of competition,[64] the

[64] Collins suggests (Br. 37–8) that the dismissal of Anchor Hocking cleared him and his associates from responsibility for transactions in connection with its predecessors; as, for example, for the elimination of Monongah and Turner, the combination with Mandeville to form General and the acquisition of Nivison-Weiskopf, *supra*, pp. 175–9. It is

combining of different licenses in one hand, and the obtaining of a favorable position against his competitors under the Hartford system (*supra*, pp. 174–80). It was principally because they desired broader license rights under the Hartford system that Collins, Fulton, and Fisher bought their way into the Hartford company through the acquisition of Monongah and ultimate distribution to themselves of substantial portions of Monongah's stock interest in Hartford. Collins combined with Mandeville of Thatcher and with Hartford to organize General in further aid of his aim to consolidate under his control the Hartford licenses of Monongah, Turner and Woodbury. This combination was authorized by Fisher; and Fisher with Collins and Fulton became directors of General. The Collins group having succeeded, with the aid of Hartford (whose stock they held and of which Collins had become a director) in obtaining the license rights of Monongah, Turner and Woodbury, Collins and Mandeville thereupon eliminated the competition of Monongah, which was in financial difficulties, by

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clear from the court's oral opinion when he passed on the motions to dismiss (fol. 12494, R. 16531) that he made no such ruling, but only held that the illegal acts of predecessor corporations could not be laid at the doorstep of Anchor Hocking. By holding I. J. Collins, and later, appellants Fulton and Fisher, in the case, the court, at least by implication, ruled that their individual activities (most of which, as shown by the record, were in connection with Anchor Hocking's predecessors) were illegal.

shutting it down, despite the fact that its business had begun to improve.[65]

Collins and Mandeville also helped Hartford get Nivison-Weiskopf "into good hands where it would cease to be a disturbing factor in the industry." They transferred Nivison's four feeder patents to Hartford, despite the fact that these patents covered a feeder which Mandeville believed did not "infringe in any way" any Hartford patents (*supra*, p. 179). As a director of Hartford, Collins was active in the patent manipulations of the conspiracy.[66] He further collaborated with the conspiracy as a member of the statistical committee of the Association.

Dilworth, as a stockholder of Hartford-Fairmont, signed the 1922 Formation Agreement in-

[65] Turner had also been "put through the wringer" (R. 3729–30).

[66] Collins has assigned error (Assignment III, R. 7908) in the consideration as against him of Exhibit 2005 (R. 14633), showing his participation in the 1932 Hartford-Hazel-Owens arrangement, on the ground that the exhibit was introduced in evidence subsequent to the time he rested at the end of appellee's case in chief. While conceding that the exhibit for this reason was not before the court for the purposes of the motion of Anchor Hocking and Collins to dismiss the complaint as against them, it is submitted that when that motion was denied as to Collins, evidence subsequently adduced became admissible against him. *Gile* v. *Duke*, 5 F. (2d) 952 (C. C. A. 9); *Ketcham* v. *Miller*, 104 Oh. St. 372 (1922); *Siegal* v. *Portage Yellow Cab Co.*, 23 Oh. App. 438 (1926); *Goodyear Tire & Rubber Co.* v. *Marhofer*, 38 Oh. App. 143 (1930); cf. *Illinois Central R. Co.* v. *Griffin*, 80 Fed. 278 (C. C. A. 7).

volved in the division of fields with Corning. As an officer of Anchor Cap he participated in license agreements and operated under the production limits of the Association (*supra*), p. 180).

Individuals may, of course, violate the Sherman Act apart from any connection with the corporation. It follows, therefore, that individuals like appellants Collins, Fulton, Fisher and Dilworth, who are connected with a corporation, may be held liable as principals for their acts where their acts are in furtherance of the conspiracy, *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 832 (S. D. N. Y.), appeal dismissed, 212 U. S. 585, even though the corporation with which they are connected and which itself was charged with liability is not held liable. *Tribolet* v. *United States*, 11 Ariz. 436 (1908).[67]

(*b*) *Variance.*—Collins contends that the court may not consider against him any evidence of his activities prior to the merger of Hocking with Anchor Cap in December 1937, on the theory that he is only charged in paragraph 25 of the complaint (R. 8) with having authorized, ordered or done acts alleged to have been performed by

[67] "There is no inherent impossibility in the corporation doing one thing and the individuals another at or about the same time." *United States* v. *MacAndrews & Forbes Co.*, 149 Fed. 823, 832 (S. D. N. Y.), appeal dismissed, 212 U. S. 585. Conversely, the corporation may be held liable even though the individuals are not adjudged to have violated the act. *United States* v. *General Motors Corporation*, 121 F. (2d) 376 (C. C. A. 7), certiorari denied, 314 U. S. 618.

Anchor Hocking. Appellants Fulton, Fisher, and Dilworth join with Collins in the further contention that, for the same reason, nothing done by any of them otherwise than in their capacity as officers or employees of Anchor Hocking may be considered. These contentions are rested on the ground of variance, which is a technical one not favored by the courts and is unavailable unless a party has been surprised or misled to his prejudice. *Gormley* v. *Bunyan,* 138 U. S. 623; *Davis* v. *Patrick,* 141 U. S. 479; *Grayson* v. *Lynch,* 163 U. S. 468; *Railroad Co.* v. *Lindsay,* 4 Wall. 650; *Heirs of Garland* v. *Choctaw Nation,* 256 U. S. 439; *Boyle* v. *United States,* 259 Fed. 803, 807 (C. C. A. 7); *Indianapolis Traction and Terminal Co.* v. *Lawson,* 143 Fed. 834 (C. C. A. 7).[69] These appellants may not now urge variance as an objection to the use of evidence of their activities in other capacities than officers of Anchor Hocking in view of their failure to object on this ground at the time evidence of this sort was introduced. *Nashua Savings Bank* v. *Anglo-American*

[69] A variance between the time when a conspirator is alleged to have joined a conspiracy and the time when he actually did join it is not fatal. *United States* v. *Francis,* 144 Fed. 520 (E. D. Pa.) modified on other grounds and affirmed, 152 Fed. 155 (C. C. A. 3), certiorari denied, 206 U. S. 565 (variance of 1½ years). Cf. *Remus* v. *United States,* 291 Fed. 501, 505 (C. C. A. 6), certiorari denied, 263 U. S. 717; *Pope* v. *United States,* 289 Fed. 312, 314 (C. C. A. 3), certiorari denied, 263 U. S. 703; *Schefano* v. *United States,* 84 F. (2d) 513 (C. C. A. 5); *Bradford* v. *United States,* 152 Fed. 617 (C. C. A. 5).

Co., 189 U. S. 221. (R. 677; R. 2900–1; R. 2928; R. 2943–4.) Rule 15 (b) of the Federal Rules of Civil Procedure provides that

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respect as if they had been raised in the pleadings.

This rule further provides for amendments to conform the pleadings to the evidence in such instances and states that failure to amend shall not affect the result of the trial of such issues. It even provides for amendment after judgment, a result which may also be obtained in this Court in the exercise of its appellate jurisdiction. (Cf. *Realty Holding Co.* v. *Donaldson,* 268 U. S. 398; *Grant Bros.* v. *United States,* 232 U. S. 647. See 3 Am. Juris. (Appeal and Error) secs. 841–4.)

Appellee submits, moreover, that there has been no variance. The allegations of Par. 25 of the complaint (R. 8) are descriptive and do not limit the allegations against these individual defendants merely because such defendants are not mentioned by name in the other allegations of the complaint. Paragraph 34 (R. 12), for example, charges that "the defendants" generally have violated the Act, without limiting such violations to activities on behalf of the corporation with which they were connected. This interpretation is borne out by the fact that Prayer 8 of the Complaint (R. 68) is

directed against "the defendants and each of them."[70]

c. *The propriety of the order on rehearing.*— The district court on February 27, 1942, granted the motion of Anchor Hocking and related individual defendants to dismiss the complaint, except as to Collins (fol. 12494; cf. Jdgt. Par. 60, R. 7692). Appellee, on May 15, 1942, filed an application for a rehearing on the motion for dismissal (R. 530) and on June 26, 1942, this application was overruled as to Anchor Hocking and other individual defendants except Fulton, Fisher, and Dilworth, as to whom it was granted (R. 531). These three appellants contend that the district court was without jurisdiction to entertain the application for a rehearing under Rule 59 (b) of the Federal Rules of Civil Procedure, which provides that—

> A motion for a new trial shall be served not later than ten days after the entry of the judgment * * *.

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[70] It was, furthermore, unnecessary to allege that these appellants were parties to the conspiracy in order to render evidence thereof admissible, since they had been charged with a violation of the act. *Robinson* v. *United States*, 33 F. (2d) 238 (C. C. A. 9); *People* v. *Luciano*, 277 N. Y. 348 (1938). Moreover, the plaintiff is not limited to proof of the specific means by which a conspiracy charged in the complaint was carried out. See *United States* v. *General Motors Corp.*, 121 F. (2d) 367, 408 (C. C. A. 7), certiorari denied, 314 U. S. 579; *Patterson* v. *United States*, 222 Fed. 599, 643, 644 (C. C. A. 6), certiorari denied, 238 U. S. 635.

and by Rule 6 (b) of said Rules, forbidding the court to enlarge the period for taking such action under Rule 59 (b).

These appellants contend that judgment for them was entered February 27, 1942. The court on that date orally granted the motion, and the clerk made a notation to that effect on the docket (R. 530). This, however, was not the order of dismissal, which was not entered until August 20, 1942 (R. 532). Inasmuch as the complaint as to these appellants was not dismissed until August 20, 1942, no judgment within the meaning of Rule 59 (b) had been entered at the time appellee filed its application for rehearing on May 15, 1942. Cf. *United States* v. *Colangelo,* 27 F. Supp. 921 (E. D. N. Y.); *United States* v. *3376.1 Acres of Land,* 27 F. Supp. 1023 (E. D. Ky.).

Even if final judgment had been rendered on February 27, however, it is indicated by the more carefully considered cases, moreover, that motions for rehearing of this sort are not covered by Rules 6 (b) and 59 (b), and that Rule 59 (b) was not intended to prescribe a time limit for the entertaining of such motions. *Bowman* v. *Loperna,* 311 U. S. 262; *Pfister* v. *Northern Illinois Finance Corp.,* 317 U. S. 262; *Seymour* v. *Hawkins,* 5 F. R. Service 692 (D. D. C.); *Pittsburgh Forgings Co.* v. *American Foundry E. Co.,* 41 F. Supp. 841 (W. D. Pa.), affirmed 102 F. (2d) 964 (C. C. A. 3), cer-

tiorari denied 308 U. S. 566. It is submitted that the contrary decision in *Safeway Stores, Inc.* v. *Coe,* 136 F. (2d) 771 (App. D. C.) is inconsistent with the decision of this Court in the *Bowman* and *Pfister* cases, *supra.* The court has inherent power over its judgments and orders during the term. *Bateman* v. *Donovan,* 131 F. (2d) 759 (C. C. A. 9); *Suggs* v. *Mutual Ben. Health & Acc. Assn.,* 115 F. (2d) 80 (C. C. A. 10).

IV

The Illegal Practices Have Neither Been Abandoned nor Rendered Moot Under Such Circumstances as to Warrant Any Modification of the Final Judgment

A. In General

All of the appellants except Hazel contend that the alleged illegal practices in which they were engaged have been abandoned under such circumstances as to render moot some or all of the issues tendered by the Government. The reward of reformation, they say, is mootness. Owens asserts the abandonment of its participation in the conspiracy as a result of the 1935 General License Agreement. Thatcher asserts abandonment through its 1936 agreement with Hartford (Ex. 243, Sec. 23, R. 8968). Lynch contends that issues as to the illegality of the Forming Machine Agreement were rendered moot by the modification of that agreement while the TNEC investigation was be-

ing conducted in 1938 and by further modification in 1940. The Association claims abandonment dating from July 1939, after the TNEC investigation, when it eliminated the forecast figures from its statistical reports. Hartford, Corning, Empire, and Ball, in support of their claims of abandonment, rely solely upon action taken during the pendency of the instant suit.

Where a conspiracy has been proved, as in this case, the burden is upon the conspirators to show abandonment. *Hyde* v. *United States*, 225 U. S. 347; *Local 167* v. *United States*, 291 U. S. 293, 297–9. Yet, the principal conditions complained of by appellee continued to exist at the time of the judgment. The pool still comprised a monopoly of patents on feeders and formers, out of which Hartford and Hazel were reaping unwarranted monopoly profits in the shape of royalties. Hartford was still in a position to maintain its status as the only supplier of feeders in the country. Hartford dominated the lehr business. Owens produced almost all glassware made on suction machines and dominated the glass-container industry. Lynch owned the Ed Miller assets and certain O'Neill assets. The 1932 Hartford-Hazel General License Agreement was in full force and effect, subject to the impounding order. Thatcher, with Owens, dominated the milk-bottle business (F. 417, R. 7364), Ball Brothers was operating under an understanding with Owens and Hazel

limiting the fruit-jar production of the last-named concerns. It continued to own the Three Rivers plant. The Association continued to distribute monthly statistics in a form readily susceptible to the imposition of moral sanctions for the limitation of production.

For these reasons, there has been no effective abandonment. In any event, it is clear that alleged acts of abandonment subsequent to the filing of suit are ineffective to render the action moot. *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257, 260; *Securities and Exchange Commission* v. *Lawson*, 24 F. Supp. 360, 365 (D. Md.) and cases cited. Cf. *United States* v. *Railway Employees Dept.*, 286 Fed. 228 (N. D. Ill.); *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 464.[71] This is especially true in an antitrust suit, where the private parties by such action attempt to foreclose the right of the Government as trustee for the public, and where the circumstances suggest that the change of heart was not at all voluntary. *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308–10.

[71] In *United States* v. *Association of American Railroads*, 36 F. Supp. 225 (D. C.), resolutions alleged to violate the antitrust laws were rescinded by defendants in the course of settlement negotiations, apparently on the understanding that the Government would then dismiss the suit. Defendants' motion to dismiss upon failure of the Government so to move was denied on the ground that the issues had not become moot.

It is also clear that an abandonment of challenged practices in anticipation of suit, or otherwise under circumstances indicating that a resumption of the challenged practices is likely in the absence of an injunction, cannot render an action moot. *Sears, Roebuck & Co.* v. *Federal Trade Commission,* 258 Fed. 307 (C. C. A. 7); *Federal Trade Commission* v. *Standard Education Society,* 86 F. (2d) 692 (C. C. A. 2), modified in other respects, 302 U. S. 112. Since an injunction controls future conduct, it can have operative effect, even though the unlawful acts to be enjoined have been abandoned. *Federal Trade Commission* v. *Goodyear Company,* 304 U. S. 257, 260. When the conduct can be resumed by a defendant of his own volition, the judgment prevents him from doing so.[72] This principle applies also to the

[72] The courts have distinguished between a case in which the issue has been made moot by circumstances not within the control of the parties (*United States* v. *Hamburg-American Co.*, 239 U. S. 466 (agreement re transoceanic passenger travel made moot by World War I); *United States* v. *Kryptock Co.*, 11 F. (2d) 874 (S. D. N. Y.) (restrictions in patent licenses made moot by expiration of the patents)), and a case, like the present one, in which the defendants by their own voluntary action seek to deprive the court of jurisdiction (*United States* v. *Trans-Missouri Freight Assn.*, *supra*, p. 308; *Federal Trade Commission* v. *Goodyear Tire and Rubber Co.*, *supra*).

alleged abandonment of practices before suit by Lynch [73] and the Association.[74]

The rule is that the burden of proving an abandonment of an unlawful conspiracy has not been sustained by one who has been shown to be continuing to share in the fruits of that conspiracy (see *Deacon* v. *United States,* 124 F. (2d) 352, 358–9 (C. C. A. 1)), even though he commits no acts other than to receive and share the fruits with continued knowledge of their source. See *Hamilton Investment Co.* v. *Bollman,* 268 Fed. 788 (C. C. A. 7), certiorari denied, 255 U. S. 571. Both Corn-

[73] Two weeks after a representative of the Department of Justice had inquired into Hartford's contract relations in November 1935 (Ex. 1830, R. 14356), Hartford suggested modification of its contracts with Lynch (Ex. 1077, R. 13720; cf. Ex. 1782, R. 14293). In 1936 Lynch rejected a suggestion by Hartford that Section 8 of the Forming Machine Agreement be eliminated because considered illegal by the Federal Government. In the summer of 1938 the TNEC investigators visited Hartford (Ex. 1773, R. 14265) and Lynch (R. 2832–3); and just a month before the commencement of hearings before the TNEC the Forming Machine Agreement was modified to eliminate section 8 and the limitation against sale of the Ed Miller type machine to persons not having Hartford forming machine licenses (R. 7351).

[74] It was only when the integrity of the Association was threatened by the resignation of Armstrong Cork Company because of the suspicious nature of the forecasts, that the percentage feature was omitted (R. 3574–5). The files of the Association also had been examined by the TNEC investigators (R. 6525) indicating that the decision in 1939 to abandon the percentage feature was at least in part a repercussion from the publicity attending the TNEC hearings.

ing and Ball, through the settlement agreements which they contend represent an abandonment, received large cash payments, and Corning received three valuable patents as well. Owens similarly received a huge cash payment under the 1935 agreement with Hartford in lieu of its right to share in Hartford's divisible income. All three of these appellants thus specifically have continued to share in the fruits of the conspiracy—to say nothing of the trade advantages which they continue to realize under the Hartford licensing system. As combinations between the parties to enable Corning, Ball, and Owens to share in the fruits of the conspiracy, these agreements are proof of its continuance. *United States* v. *Masonite Corp.*, 316 U. S. 265, 282–3.

All of the appellants, moreover, assert that these acts complained of by the appellee were not illegal. This carries an implied threat of a resumption of the practices held to be illegal if appellants are successful and necessitates injunction to prevent mootness from becoming an invitation to the appellants to renew such practices. *United States* v. *Trans-Missouri Freight Assn., supra,* p. 308. Accord: *United States* v. *Bates Valve Bag Corp.*, 39 F. (2d) 162 (D. Del.); cf. *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257; *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 464. As stated in *United States* v. *Pullman Co.*, 50 F. Supp. 123, 136 (E.

D. Pa.), "The decree will insure the continuance of such reformed practices." [75]

None of the cases relied on by appellents justifies their claim of abandonment. In *United States* v. *U. S. Steel Corp.*, 251 U. S. 417, the Government was seeking dissolution and put no emphasis upon injunctive relief against specific practices. In dismissing the suit, partly because of the abandonment of the illegal acts nine years prior to the decision, this Court pointed out that there was no evidence that "the abandonment was in prophecy of or dread of suit" (p. 445). In *Industrial Association* v. *United States*, 268 U. S. 64, the practice abandoned was of minor importance and the court found (p. 84) that "nothing appears by way of threat or otherwise to indicate the probability of its ever being resumed." The facts of the instant case are also dissimilar in essential respects from those in *Standard Oil Co.* v. *United States*, 283 U. S. 163, 181–2, since the provisions complained of in that case "had never been enforced"

[75] Judge Learned Hand, in *United States* v. *Corn Products Refining Co.*, 234 Fed. 964, 1015 (S. D. N. Y.), appeal dismissed, 249 U. S. 621, went further and said:

"Some of the unfair practices have undoubtedly been stopped; some ceased long before the petition was filed, and there is indeed no reason to suppose that they will again be resumed; but defendants are in no position to complain against a decree of court specifically forbidding them from any resumption of practices which were merely the incidental manifestations from time to time of a purpose which actuated them throughout their whole progress."

and were insignificant features of the license contracts involved.

B. THE ASSOCIATION HAS SHOWN NO ABANDONMENT

Even if the omission of quotas or percentage forecasts [76] from the Association's statistical reports had not been caused by the TNEC investigation which foreshadowed the instant suit, it could not absolve the Association from responsibility, because, while perhaps calculated to remove the form of illegality, it was clearly designed to preserve the substance upon which the quota system had been built up. In its new form, the statistical report is as potent an instrument for concerted action in the limitation of production as was the form in use prior to July 1939. It shows the shipments of the industry as compared with those of the company in question for the preceding five years (R. 607; Ex. 607, R. 13218). It includes the very significant figure of the ratio of production to capacity for the industry as a whole and for the company in question. It furnishes the basis for the manufacturer to determine his own quota by obtaining the five-year average of his company's percentage of the whole industry (*ibid.*). The comparison is made more graphic by including a comparison of the active capacity and actual shipments of the industry and of those of the company in question for the preceding

[76] See p. 160, *supra*.

month, the year to date, and the preceding 12-month period. Only the application of moral sanctions is necessary to convert these reports into potent weapons to keep the members "in line."

C. OWENS HAS SHOWN NO ABANDONMENT

Owens contends that it has discharged its burden of proving withdrawal from any conspiracy (cf. *Hyde* v. *United States,* 225 U. S. 347; *Local 167* v. *United States,* 291 U. S. 293) by virtue of the 1935 agreements, coupled with (1) absence of evidence of its participation in further restraints and (2) presence of evidence of its competition in the industry thereafter (Br. 28).

Many of the features of the 1935 contracts which helped to maintain Owens in its position in the conspiracy are set forth in the Statement (pp. 113–7, *supra*). The 1935 Owens-Hazel contract (Ex. 572, R. 9131) had an additional illegal feature. Owens agreed that if neither Owens nor Hazel should be a licensee of Hartford, or if Hazel should cease to be a licensee and Owens should manufacture less than 15% of its total production on Hartford's licensed inventions, Owens would grant Hazel a license under Owens' patents. Under this license, however, Owens was to *exclude* Hazel from Corning's fields of ware. Since Owens was not excluded from those fields by any license from Corning covering inventions embodied in Owens' feeders or forming machines, and since, in the event Owens

ceased to be a licensee of Hartford, Owens would no longer be excluded from those fields by contract with Hartford, Owens was under no necessity of excluding Hazel from such fields. Its election to do so could be construed only as a voluntary step to protect the Corning monopoly. Through this agreement, Owens has continued to participate in the conspiracy since 1935.

Withdrawal from a conspiracy is not shown by a change of status from active to silent partnership (*Stephens* v. *United States,* 41 F. (2d) 440 (C. C. A. 9), certiorari denied, 282 U. S. 880), nor is the burden of proving abandonment sustained by one who has been shown to be continuing to share in the fruits of the conspiracy. See cases cited, *supra,* p. 312.

That Owens continued to share in the fruits of the conspiracy is clear from the record. Owens—a glass manufacturer—was primarily interested in minimizing glassware competition from other manufacturers (cf. Ex. 25, R. 12418). Its activities during the first period of its partnership with Hartford were designed to protect it against "excessive" competition (1) by preventing Hartford from engaging in "reckless" licensing; and (2) by sharing in the royalties paid by those competitors whose existence it was willing to suffer. These aims were implemented by Section 22 of the 1924 agreement with Hartford and by the requirements that Hartford give it a share in the

royalties paid by its competitors (*supra*, pp. 55–9).

Only after its combination with Hartford had resulted in the issuance and acquisition of patents through which its competitors were brought under control; and only after it was convinced that Hartford would not engage in the "reckless granting of licenses" (Ex. 405, R. 13016), did Owens feel free to change the form of its written contracts, in deference to the danger of antitrust prosecution. This, moreover, was accomplished in such a way as to preserve the full benefits of the conspiracy which it had theretofore enjoyed.

Thus, in May 1930, when Owens and Hartford were negotiating for the elimination of Section 22 because of fear of governmental attack (Ex. 671b, R. 13340), H. K. Smith wrote Owens (Ex. 405, R. 13016):

> You people probably know now a good deal better than you did six years ago in 1924 how firmly our policy is established of avoiding any wild-cat and reckless granting of licenses, regardless of any contract obligations to anyone else.

Carter did not fail to catch the offer of a tacit understanding. Writing Levis in December 1930, he stated (Ex. 409, R. 13024C):

> We have been dealing with Hartford under our 1924 agreement for more than six years now and have never found any tendency on their part to act recklessly or in disregard of basic conditions. Believe we may safely

conclude that their attitude in the future will not be different.

This is not the language of a man seeking to withdraw from an illegal combination. Here, as in the *Local 167* case, *supra*, "the conspiracy was not for a temporary purpose but to dominate a great and permanent business" (291 U. S. at 297)."

We have shown (*supra*, p. 58) that Hartford continued to consult with Owens after 1935 before granting licenses to newcomers. Owens argues that testimony on these points should not be relied on by this Court because appellants Levis, McNerney, and Eldred denied that after 1931 there was any arrangement between Hartford and Owens whereby Owens must approve licenses to be issued by Hartford (br., p. 50). The witness Schwenzfeier testified unequivocally, in explaining why Hartford had failed to license a proposed glass plant in Detroit, that Eldred, of Hartford, had informed him that such an arrangement did

[11] The fact that there was no formal agreement by Hartford to respect Owens' wishes in the granting of licenses is of no significance so long as there was a common design. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 226–7; *Williams* v. *United States*, 3 F. (2d) 933, 935 (C. C. A. 6). Conspiracies "may be inferred from the things actually done," *Eastern States Retail Lumber Dealer's Association* v. *United States*, 234 U. S. 600, 612, and may "be implied from a course of dealing," *Frey & Son* v. *Cudahy Packing Co.*, 256 U. S. 208, 210.

exist in 1936.[77a] The district court, who saw the witness Schwenzfeier and heard his testimony, concluded that he was telling the truth (F. 122 (9), R. 7303). On the other hand, the district court stated as to some of the defendant witnesses that their (Op. R. 17)—

> * * * reticence * * * to disclose what plainly was within their knowledge as principal actors in the main conferences that occurred over a period of time, and that resulted in the consummation of important agreements, was of such a pronounced character as to discount substantially the weight of their testimony, and their credibility, in the eyes of the court.

The finding of the court which saw and heard the witnesses is not to be disturbed under such circumstances. (See cases cited *supra*, p. 291.)

In 1932, when Owens and Hartford decided that Hartford should receive only a non-exclusive, rather than an exclusive, license to use the feeder inventions of Owens, appellant Belknap wrote (Ex. 1778, R. 14266):

[77a] Schwenzfeier's personal history and background is such that his testimony is entitled to the credence given it by the district court (F. 122 (9), R. 7303). He certainly had no reason to be biased against Owens. He was employed by a predecessor of the Owens Company in 1901. He helped develop the first suction machine ever made (R. 2266). He left Owens in 1929, having held the highly responsible position of general factories manager of the Company (R. 2259). In March 1930 Hartford hired him because of his familiarity with "the practical side of the suction field" (Ex. 260, R. 12808A).

> * * * this is a matter which is done simply to guard against government interference and is nothing which Owens-Illinois itself cares for.

It is a fair inference that the reason Owens was not interested in this provision of the contract was because it did not intend to license others to use its feeder inventions in the manufacture of glassware. Thus Owens never intended to permit the formal change in the contract to change in any way the relations between the parties."[77b]

In March 1935, after the late Senator Borah had read a letter into the Congressional Record which had the effect of publicizing the investment of Illinois Glass Company in Hazel, appellant Levis, president of the Illinois Company, and of appellant Owens, advised McNash that "it would probably be desirable" for Levis to resign from the Hazel Board (Ex. 827, R. 13493). Here again, however, the change was one merely in form, for Levis proposed to have Quay, Secretary of Hazel (*ibid.*)—

> * * * elected in my place, with the understanding that he would be representing us and that I would receive through him the same type of information I now receive as a Director.

[77b] In fact, after the modification of the contracts in 1932, Owens never did license any one else under its feeder inventions, although it did agree in 1935, that it would give Hazel a license in the event of certain contingencies (see pp. 319–20, *supra*).

In September 1935 Owens desired to make further changes in form, but not in substance, in its written contractual relations with Hartford. The substitution of $2,500,000 in installments to be paid over a period of almost three years in lieu of Owens' right to share in Hartford's royalties (*supra*, pp. 113, 115) is an example. Another is the cancellation in 1935 of the agreement by Owens not to use or to grant sub-licenses under its direct license from T. R. & B. (see fn. 17, p. 75, *supra*) as long as Owens held a direct license from Hartford (Ex. 761, R. 13445). At the same time Hartford and Owens also cancelled the contract of February 11, 1926 (*ibid.*) in which Hartford gave Owens a license under its patents "as to claims which had been in interference with Tucker, Reeves & Beatty, and which if they had been made at the proper time might properly have been put in interference with the application of Tucker, Reeves & Beatty" (*ibid.*). Some Owens representative—probably L. T. Williams, Esq.,[78]—wrote of this cancellation (*ibid.*):

> * * * both Hartford and Owens could well take the chance that the other would

[78] The memorandum is unsigned and undated, but the portion quoted in the text indicates that it was written by an Owens representative, and Mr. Lloyd T. Williams testified (R. 3681) "it sounds like my writing, but I don't recall it." The context indicates that the memorandum was written in 1935, probably between May 21 (see Ex. 567, R. 13180) and September 30 (see Ex. 568, R. 9113).

> be treated fairly in the matter by canceling all licenses between Hartford and Owens. We could not have any agreement between ourselves, but we at least could hope that Hartford would not interfere with our use of Tucker, Reeves and Beatty, and they, on the other hand, could reasonably hope that we would not go out and license people generally under Tucker, Reeves and Beatty. In other words, there would be enough club hanging over each one of us that the thing would probably work itself out without any contracts, understandings, or agreements between the parties."[79]

In Section VIII of the Appendix (pp. 434–6) is a list, supported by reference to the record and to the findings[80] of the acts done by Owens since September 30, 1935, upon which the Government

[79] On January 14, 1942, one week before the trial in this case ended, Owens again modified its written contracts with Hartford. Even this change illuminates Owens' policy of evasion through changes in form but not in substance. In the schedule of "exclusions" attached to Owens' 1935 license to Hartford, Hartford was expressly excluded from using those inventions in the manufacture of fiber glass (Ex. 568, R. 9113). This schedule was expressly stricken from the 1942 contract; but the same result was obtained by redrafting the definition "licensed inventions" so as to exclude therefrom inventions relating to fiber glass (Ex. O–6173, R. 9882). It is true, as Owens observes (Br. 12, footnote 1), that fiber glass is excluded from the definition of "glassware" in the final judgment; but this does not alter the fact that Owens, while purporting, through change in form, to remove all ware restrictions, in fact continued one of them in effect. The 1942 amendment made other modifications in the 1935 license, which are discussed *supra*, p. 184.

[80] More than half of these findings are uncontroverted.

relies to show that Owens continued actively to participate in the general conspiracy. Some of these acts have already been discussed.

Certainly the facts disclosed in this case do not constitute a record of one who has repented and mended his ways by disavowing or opposing the purposes of the conspiracy. On the contrary, it is the record of a corporation and its officers who, though "conscious [of] wrongdoing," embody their transactions in forms designed "to obscure the result actually attained." *United States* v. *American Tobacco Co.*, 221 U. S. 106, 182.

V

The Judgment of the Court Below Is Designed To Give Effective Relief and Should Not Be Modified Except in Certain Minor Respects

CONCEDED MODIFICATIONS

In a few minor respects, appellee agrees that the judgment is defective and consents to its modification.

Paragraph 5 (R. 7659). Appellee consents to the modification of Paragraph 5 to confine to heat-resistant ware the adjudication that Corning, Hartford, and Empire, with the individual defendants associated with each, "have monopolized" trade in violation of Section 2 of the Sherman Act; and to exclude laboratory, paste mold and electrical ware from the adjudication of attempted monopolization by such defendants.

Paragraph 9 (R. 7660–1). Appellee will agree to the elimination of Paragraph 9, generally enjoining appellants from violations "as charged in the complaint."

Paragraph 52 (b) (R. 7687). Since the language of clause (b) of Paragraph 52 is not aptly phrased to express the intent of the provision, appellee will consent to its modification to read as follows:

> (b) with the intention of never making commercial use of the inventions covered thereby, provided that failure to make such use within four (4) years from the date of issuance of patents thereon shall be deemed *prima facie* proof of the presence of such intention at the time of the filing or prosecution of such applications.

There are also several instances in which there may be doubt as to the proper construction of the judgment. If the Court believes that the language of these provisions does not support the construction we suggest, we have no objection to an appropriate modification. (See pp. 381, 385–7, *infra.*)

INTRODUCTORY

With respect to many of the provisions of the judgment, appellants confront the Court with a series of imagined hardships that might result from a strained interpretation of certain phrases of the judgment, or that might be incurred upon a purely speculative state of future facts. A sane appraisal of existing conditions will suffice in most

instances to show the speculative nature of the supposed hardships. In other instances, as we shall show, an intelligent reading of the judgment will preclude the meaning that appellants seek to attribute to it.

Appellants' attacks upon the judgment ignore the fact that the court was required to deal with the immediate problem that appellants have created by imposing monopolistic control upon an entire industry. Although the decree the court entered necessarily operates *in futuro,* its operation must be judged in terms of the present situation and not by a reference to hypothetical situations or imaginary hardships. The issue now is whether the decree is properly framed to remove the existing evil consequences of appellants' acts and to prevent appellants from promptly resuming in new guises the illegal conduct that created those consequences. The consideration of this issue should not be obscured by projecting the operation of the decree indefinitely into the future and then imagining situations in which its provisons may be subject to criticism.[81]

[81] The Court expressly reserved the power to change the terms of the judgment. Cf. *United States* v. *Swift and Company*, 286 U. S. 106, 114.

It is the position of the government that the provisions of the present judgment are now justified but it is not our position that all of its provisions should necessarily run in perpetuity. Certainly if conditions change and a free and competitive industry comes into existence so that limitations now properly placed on appellants are then inappropriate, unnecessary, or harsh, these limitations should then be lifted or modified, but that problem is not now before this Court.

A. ROYALTY-FREE COMPULSORY LICENSING IS IN THIS CASE A PROPER REMEDY TO "PREVENT AND RESTRAIN" FURTHER VIOLATIONS OF THE SHERMAN ACT

Section 4 of the Sherman Act vests the district courts with jurisdiction "to prevent and restrain violations of this Act."[82] The method to be employed in preventing violations depends upon the facts of each case. *United States* v. *Union Pacific R. Co.*, 226 U. S. 470, 474. A judgment under the Sherman Act should grant relief that is effective and adequate to the occasion. *Local 167* v. *United States*, 291 U. S. 293, 299; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 308. It should be phrased to prevent evasion; and any doubts in framing its provisions should be resolved in favor of the Government and against the conspirators. *Local 167* v. *United States, supra.* The dominant object should be to restore as far as possible the competitive conditions destroyed by the illegal combination and thus to dissipate the effects of the violations of law. See *Standard Oil Co.* v. *United States*, 221 U. S. 1, 77–78. Cf. *B. B. Chemical Co.* v. *Ellis*, 314 U. S. 495, 498.

Where the condition which has been brought about in violation of the statute is, as here, a con-

[82] The pertinent portions of Section 4 of the Act of July 2, 1890, c. 647, 26 Stat. 209; Sec. 291 of the Act of March 3, 1911, c. 231, 36 Stat. 1167, 15 U. S. C., § 4, are as follows:

"Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain

tinued attempt to monopolize and also a monopolization, "the duty to enforce the statute" has been held to *"require"* not only injunctive relief against "the doing in the future of acts like those * * * done in the past," but also

> such measure of relief as will effectively dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force

which has been brought about. *Standard Oil Co.* v. *United States, supra,* pp. 77–78; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 187–188; *Decrees and Judgments in Federal Antitrust Cases,* 165, 192. Cf. *United States* v. *Reading Co.,* 253 U. S. 26, 63–64, motion to modify decree denied, 253 U. S. 478; *United States* v. *Lehigh Valley R. Co.,* 254 U. S. 255; *United States* v. *E. I. du Pont de Nemours & Co.,* 188 Fed. 127 (C. C. Del.), 273 Fed. 869, 871 (D. Del.).[83] In these cases decrees of dissolution were entered.

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violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. * * *"

[83] As stated by Day, Pitney, and Clarke, JJ., dissenting, in *United States* v. *U. S. Steel Corp.,* 251 U. S. 417, 463–464: "The remedy by injunction, at the instance of the Attorney General, was given for the purpose of enabling the courts, as the statute states, to prohibit such conspiracies, combina-

In discussing the remedy under the Sherman Act in *Northern Securities Co.* v. *United States*, 193 U. S. 197, this Court said (p. 346):

> In short, the court may make any order necessary to bring about the dissolution or suppression of an illegal combination that restrains interstate commerce.

Pursuant to this principle, appellee prayed that Hartford be dissolved and its patents and other properties rearranged under several separate and independent corporations in such a way as effectively to terminate the monopoly and prevent further violations of the Sherman Act. (Complaint Prayer 9, R. 69.)

To have confined the remedy to the enjoining of illegal practices would not only have been in disregard of the principle of the *Standard Oil* and other cases just cited, but obviously would have been ineffective for the effects of the conspiracy would not have been dissipated. There were at least three types of remedies, however, which the Court might have adopted to supplement injunctive relief; namely, the divestiture of patent rights acquired from others, the dissolution of Hartford into competing companies and compulsory licensing. The first of these methods would not have been feasible or helpful. Many of the

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tions, and contracts, and this court interpreting its provisions has held that the proper enforcement of the act requires decrees to end combinations by dissolving them and restoring as far as possible the competitive conditions which the combinations have destroyed."

companies from whom the rights had been acquired were no longer in existence. Not only had conditions so changed since the acquisition of many of these patent rights as to render it impossible to reestablish any semblance of the conditions existing at the time of the acquisition; but this type of relief was the form which appellants had long ago foreseen and against the impact of which they had carefully prepared. Typical of appellants' state of mind is the concluding paragraph of H. K. Smith's 1925 memorandum entitled "Procedure" (Ex. 76, R. 12574):[84]

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[84] This exhibit also states (R. 12573–4):

"It may be well to consider here, also, what would be the result should any or all of these matters be upset by Government action, as follows:

"O'Neill

"* * * Meanwhile the O'Neill organization and business as a going concern would have been irrevocably disposed of. We might be forced to put our O'Neill U. S. patents up for auction and sell them for a song and perhaps lose a few thousand dollars this way, but I cannot see that anything serious can happen in any event as to this transaction.

* * * * * * *

"Federal

"Under similar circumstances, a dissolution here might be much more serious, depending upon the nature of the decree. It could hardly force us to give up any patents taken out in our name. We might conceivably be forced to dispose of patents practically taken out in the name of T. R. & B. and assigned to us. By the time, however, that such decree would become final, we would hope that the situation would be such that those Federal patents would not be worth much to anybody. We might lose whatever value we paid for them, but that would be all.

"Of course, the court might order that we transfer the

I, therefore, do not see much danger of having any of these deals upset, as set forth. If they are upset, I still believe that by that time, we will be in a better position even with such dissolution than we would be otherwise; and I see no danger whatsoever of any criminal liability because the cases are necessarily so doubtful in the matter of law that they could never get any jury to convict and I doubt if any prosecuting officer would ever attempt any criminal action. Criminal action in cases

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entire Federal licensing business to some other party and turn over to that party the Federal patents. This, of course, would simply restore to a certain extent the existing situation and establish a competitor. It would have either one of two results—either that competitor would be in a reasonably strong position, in which case we could probably dispose of all these assets as a going concern for somewhere near what we paid for them and take our chances with competition. Or, by that time, the situation would be such that it would be practically impossible to restore the old Federal competition even if it had all the Federal patents; in which case we wouldn't get much for the sale of these assets, but on the other hand, the competition wouldn't be serious.

"Meantime, we would have gotten out our own patents; probably had the income from Federal licenses for several years and very possibly also, as a result of the Federal and the other deals, we might have brought in Hazel-Atlas under license."

A copy of this memorandum was sent to counsel for Owens, Lloyd T. Williams, Esq. He replied with a letter inclosing a "memorandum somewhat along the lines of your own." This memorandum, an excerpt from which is quoted in the text, indicated that Owens was in substantial agreement with Hartford as to the tactics to be employed (Ex. 77, R. 12574A—12577).

> of this sort, so far, has practically been non-existent.

Counsel for Owens, in discussing additional acquisitions, also took into account the possibility of future dissolution of the combination, stating (Ex. 77, R. 12576):

> In view, however, of the possibility of successful attack on the Federal acquisition, it might be well to so apportion the rights thereto between Owens and Hartford at the time of acquisition or in the acquisition as to properly protect both Owens and Hartford in case of dissolution.

(For further manifestations of the same intention, see footnote 90, p. 56, *supra.*) Moreover, mere divestiture of patents acquired from others would have left wholly untouched the patents at present claimed by appellants to be dominant, which Hartford had obtained from the Patent Office as a result of the conspiracy.

The second method would have involved the dissolution of Hartford and creation of several competing patent-licensing and machine-servicing concerns. The dissolution of a company whose assets consist chiefly of patents and an integrated research and engineering organization obviously involves difficulties not present in the case of an ordinary commercial or manufacturing company which owns physically separable properties. As a result of appellants' activities, a patent situation has been created which would have made it impracticable to attempt to divide Hartford's patents

among two or more competing companies. It therefore would have been necessary to have given all of the new companies rights under all of the patents now in the pool. These problems, together with the fact that it would have been necessary to provide capital, at least initially, to support the competing companies, created a situation which may have induced the trial court to consider dissolution inadvisable.

Accordingly, the district court decided to make an attempt to avoid dissolution, if possible to do so and at the same time to restore competition (R. Op. 156–7).[85] It chose the third method of

[85] Hartford contends (Br. 134) that the district court, in refusing evidence on the question of remedy, indicated that an opportunity would be afforded to submit such testimony later, and complains that such opportunity was never given. It is, however, apparent from reading in full the paragraph only partially quoted by Hartford that the court's ruling did not refer to the matter of the general remedy but solely as to (R. 4963–4):

"what disposition might be made of the Hartford Company in the event the Court found the contentions in the complaint to be true."

That the intent of the ruling was to permit further testimony only in case dissolution of Hartford was ordered is shown by the subsequent statement of the Court in denying the motion of certain non-defendant licensees to file an *amicus* brief, when the Court referred to the possible "division" or "disintegration of Hartford-Empire Company." (R. 6853.)

Hartford also states (Br. 134) that appellee approved this procedure; but the reference cited by Hartford shows clearly (R. 4959) that appellee's counsel referred to the taking of "evidence on the issue of dissolution." Appellee maintained this position consistently (R. 4960–2).

permitting Hartford to retain its patents and other assets and requiring it so to alter its method of business as to dissolve the licensing system and the control thereby exerted over the glassware and machinery industries. At the same time, the Company was permitted to remain in business and continue its organization for the purpose of selling its equipment and making available to glassware manufacturers its research and engineering services.[85a]

At the heart of the district court's remedy were the requirements that Hartford should agree, as a condition of doing business through the channels of interstate commerce,[86] to sell its machines out-

[85a] The fears expressed by Buck Glass Company and certain other licensees in a brief *amicus curiae* filed in this case that the decree will be detrimental to them because it will deprive them of Hartford's technical services are unwarranted.

A brief filed as *amicus curiae* by counsel for nine companies comprising the Knox group of non-defendant licensees disagrees with the conclusions in the brief filed by Mr. Buck. The Knox brief points out that there is nothing in the judgment to prevent Hartford from continuing to furnish technical service to glassware manufacturers, and concludes that the remedies provided in the judgment will be beneficial to the glass industry.

[86] The device of requiring appellants to agree to certain terms as a condition of continuing to employ the channels of interstate commerce is not new and has the sanction of this Court. Indeed, this Court has said that violators of the Sherman Act might be enjoined entirely from engaging in interstate commerce if necessary to an effective neutralization of monopoly power. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 186. When Congress lays down a rule to gov-

right (Jdgt. pars. 21–3, 25, R. 7665–8), to grant royalty-free licenses to all applicants under the patent rights presently in the pool, including pending applications (Jdgt. par. 24 (a), R. 7667), and to grant such licenses at reasonable royalties under any patents issued on applications filed subsequent to the date of the judgment (Jdgt. par. 24 (b), R. 7668).[97] Appellants' attack is in large part directed at the provision for royalty-free compulsory licensing of the patents now in the pool.

1. *The need for royalty-free compulsory licensing*

(a) *Compulsory licensing.*—The conspiracy to monopolize commerce in glassware and machinery had as its sanction the Hartford licensing system, the essence of which was the power to exclude anyone from the glassware industry as a whole or from

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ern a transaction in interstate commerce, it may deny to those who violate that rule the right to engage in such transactions. See *Electric Bond and Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419, 442, and cases cited; *United States* v. *Darby*, 312 U. S. 100.

[97] Hartford states (Br. 68) that the Government "conceded that Hartford—in some form, with certain suggested revisions—should be continued for the industry's best interests," citing the Government's oral argument in the district court. The two suggested revisions were:

"* * * One is royalty-free compulsory licensing of the existing patents for the duration of the patents; and the other is by reorganization of the Hartford Company, to prevent it in the future from repeating the present situation." [Fol. 12639 not printed. Stip. R. 16531.]

any part of it. The controlling policy in the granting of licenses was the protection of appellants against undue, or any, competition in their particular fields. To have left Hartford with the power to choose its own licensees would have enabled it to maintain the other appellants in the favored position which their unlawful practices had given them.

The most effective way of avoiding these abuses is to compel Hartford to license all comers. The means adopted for neutralization of the monopoly power must be directed to the sources of that power and cannot be limited to restricting its exercise, while leaving the power and its effects untouched. *United States* v. *Reading Co.*, 226 U. S. 324, 352–3. The mere existence of the power to select the licensees carries with it an opportunity for abuse that cannot be ignored when the opportunity is proved to have been utilized in the past.[88] Cf. *United States* v. *Swift & Co.*,

[88] This broad form of relief is also required because the long association in a common monopolistic objective has bound appellants together with ties which are not easily severed. The habits of concerted action which have become deeply embedded in the consciousness of the conspirators are illustrated by the willingness of Owens to rely upon Hartford to observe the spirit of Section 22 of the 1924 Agreement even after its cancellation (*supra*, pp. 321–2), and by the unwritten "understanding" under which Owens and Hazel limited their fruit jar production for the benefit of Ball (*supra*, pp. 151–4). To most of the appellants, monopoly has become a normal way of life and they may be expected almost subconsciously to continue in the same pattern unless broadly and comprehensively prevented.

286 U. S. 106, 116. Since the sources of the monopoly power of the instant combination were the patent pool and licensing system, the judgment properly struck down the ill-gotten exclusory power inherent in that pool and system. *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436; *United States* v. *Univis Lens Co.,* 316 U. S. 241, 254.[89]

By the simple expedient of opening to the public the patent rights illegally accumulated in the pool, the district court has destroyed the root of the monopoly.[90] This will tend to attract

[89] Owens complains (Br. 179–181) that compulsory licensing under paragraph 24 will operate unfairly as against Owens because of the provisions of paragraph 51 (R. 7686–7) prohibiting the acquisition of patents covering competing inventions. Owens speculates that because of its inability under paragraph 51 to acquire patents covering improvements upon inventions covered by its own basic patents, the inventor of such an improvement might under paragraph 24 obtain a license under the basic patent and combining the two inventions, might outstrip Owens competitively. The possibility of such a result is not only remote, but the likelihood of its offering more than healthy competition to such a powerful company as Owens is infinitesimal. The problem, if it arises, can safely be left to be dealt with under the provisions of paragraph 57 (A) of the judgment (R. 7691–2) providing for future modification of the decree upon application to the district court. It could, in that event, be solved by requiring the applicant desiring a free license under paragraph 24 to agree to grant cross-licenses to the licensor on the applicant's improvement patents.

[90] The compulsory licensing provisions are properly implemented by paragraph 24 (c) of the Judgment (R. 7668), requiring appellants further to agree as a condition of

new capital into the industry, to stimulate research and revive invention,[91] and thus to create a strong competitive situation. It will permit the use in competition of the inventions and potential developments which, through the course of the years, have been "fenced in" and "blocked off" by unused patents in the pool.

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employing the channels of interstate commerce that they will make available to any licensee, at cost plus a reasonable profit, a copy of drawings of patents relating to the licensed inventions. As a practical matter, patents as complicated as those here involved seldom reveal all of the details essential to the manufacture and operation of the patented inventions. This provision is necessary to give full effect to the licensing requirement and to avoid useless and perhaps costly repetition of experiments already performed. Hartford misinterprets the provisions of paragraph 24 (c) to require the handing over of working papers relating not only to commercial models of machines but experimental models built for research purposes only (Br. 161). The drawings and patterns which must be made available, however, are clearly limited to those embodying licensed inventions relating to the machinery or methods used in the manufacture of glassware and, therefore, do not go beyond drawings or patterns relating to the equipment covered by the patents. This provision should not be construed to call for the disclosure of unpatented trade secrets.

[91] The effect of competition in stimulating invention is well illustrated in the record. It was competition from the Knox-O'Neill machine which forced Hartford to develop a new forming machine. Ex. 388, R. 12963; cf. Ex. 591, R. 13207; Ex. 703, R. 13400. It was the competition of Lynch and O'Neill which stimulated Hartford's inventor Lorenz to work out a new idea in connection with the No. 12 forming machine (R. 5687).

Owens implies (Br. 178–9) that the compulsory licensing provisions would have the effect of stifling invention. The

It cannot be doubted that the court, through its inherent broad equity powers, could adopt this method, rather than the dissolution of Hartford, as a means of neutralizing the monopoly. In justifying the dissolution of a corporation because of abuses of the officers and majority stockholders directed against the preferred stockholders, the court in *Tower Hill-Connellsville Coke Co.* v. *Piedmont Coal Co.*, 64 F. (2d) 817, 825 (C. C. A. 4) quoted with approval the following statement, made on circuit by Mr. Justice Brewer of this Court:

> I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations and the protection of rights can demand.

Equity goes further to give and withhold relief in the public interest than it does when only private interests are involved. See *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 552; *Pennsylvania* v. *Williams*, 294 U. S. 176,

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record indicates the contrary, however. The fact that Owens since 1935 enjoyed a nonexclusive royalty-free license on all of Hartford's suction inventions (Ex. 571, R. 9126) has not deterred Hartford from engaging in experimental work in the suction field, as Owens itself observed (Br. 73, citing R. 4480-2). Owens cannot consistently argue that Hartford may have hoped to realize royalties from the licensing of suction to others than Owens (Br. 73), in view of its further contention that no manufacturer other than Owens had an interest in suction (Br. 36).

185; *Central Kentucky Gas Co.* v. *Railroad Commission,* 290 U. S. 264, 270–3. The absence of exact precedent will not deter a court of equity from giving relief appropriate to the situation before it. *Nashville, C. & St. L. Ry. Co.* v. *M'Connell,* 82 Fed. 65, 75–76 (N. D. Tenn.); *Hamilton* v. *Withredge,* 11 Md. 128, 145 (1851).

Relief analogous to compulsory licensing in lieu of dissolution has been common in antitrust suits. Thus in *United States* v. *Terminal R. R. Assn.,* 224 U. S. 283, a terminal association which was monopolizing the means of access to the City of St. Louis was required, on pain of dissolution, to submit a plan for the admission of other railroads to joint ownership and control on reasonable terms, and for the use of the association's facilities on similar terms by railroads not electing to become owners. In *United States* v. *Great Lakes Towing Co.,* 208 Fed. 733, 747 (N. D. Oh.), the defendant was offered a similar alternative to dissolution; namely, the presentation of a

> plan whereby its service shall be given for the equal benefit of all requiring the same * * * so that the company becomes in truth "the bona fide agent and servant" of every vessel owner who shall use or need its facilities, and so that the rights of competitors are completely safeguarded * * *.[92]

[92] Thereafter the court devised a scheme which it thought met the indicated test (217 Fed. 656) and the Government dismissed its appeal to the Supreme Court (245 U. S. 675).

In *United States* v. *New England Fish Exchange*, 258 Fed. 732, 752 (D. Mass.), defendants were required to submit regulations, upon pain of dissolution, opening up a fish pier to outside dealers. More recently, a three-judge court, in *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E. D. Pa.), required the Pullman Company, contrary to its previous practices, to operate sleeping cars manufactured by anyone and to furnish through-line service to any railroad unconditionally.

(*b*) *Royalty-free.* Compulsory licensing, standing alone, would not have been enough to restore the industry to a healthy, competitive condition. The ability to collect royalties was, in itself, one of appellants' most important sources of economic power. Appellants recognized, for example, that the imposition of royalties was one way of discouraging price cutting (see footnote 23, pp. 360–1, *supra*).[92a] They divided royalties among the more powerful members of the conspiracy to induce acquiescence in its purposes,[92b] and they used the

[92a] Cf. the statement in *Standard Oil Company* v. *United States*, 283 U. S. 163, 174, "If combining patent owners effectively dominate an industry, the power to fix and maintain royalties is tantamount to the power to fix prices."

[92b] Appellant Levis, in announcing his price policy to the Owens Board of Directors in February 1930 (Ex. 775, R. 13453), said:

"Our negotiations with Hartford-Empire Company and others, so far as our patent situation and royalty income is concerned, should be to attempt to secure a position whereby we pay no royalty on any item we produce and we attempt to force all others to pay royalty on every item they produce, we participating with anyone else in the royalties they receive."

royalties generally to finance the campaign that made the combination successful."[96] The trial court was entitled to assume that power once used for these illegal purposes could be so used again. If the decree was to be truly remedial, it could not safely leave this power untouched.

Moreover, even with compulsory licensing, if appellants continue to receive royalties on the patents in their unlawful pool, they will still be exacting tribute from the public for their past unlawful acts. This burden would never have been imposed if it had not been for the conspiracy, and the effects of the monopoly will not be dissipated so long as the public is required to pay royalties on the patents unlawfully procured. That appellants have no right to enforce patents obtained under the circumstances of this case is clear. *Morton Salt Co.* v. *Suppiger Co.*, 314 U. S. 488; *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240.

We have noted how carefully various steps in the conspiracy were planned so as to avoid the impact of an antitrust decree. Appellants anticipated that even if their conduct was held to violate the Sherman Act, the courts would be powerless to deprive them of the benefits of their scheme.

[96] In this connection it is interesting to recall F. G. Smith's statement that Hartford had been successful in collecting some seven or eight hundred thousand dollars a year in royalties on machines that were not covered by patents (Ex. 79, R. 12578D).

If all users of devices covered by the patents are required to continue paying royalties to appellants, this prediction will turn out to have been correct. For although, with compulsory licensing, appellants will be unable to continue their wrongdoing, they will still be receiving the fruits of their past misconduct. The powers of a court of equity are not too feeble to cope with such a plan. See p. 341–2, *supra*.[39]

It is contended that even in the *Morton Salt* and *Keystone* cases, the patentees were not deprived of the right to enforce the privilege permanently, but only until the effects of the abuse had been dissipated. The district court did not overlook this principle here (Jdgt., par. 26, R. 7669). Even when the misuse of the patent privilege consists of an unlawful tying practice, as in the *B. B. Chemical* case, the elimination of the clause has been held not to terminate the effects of the patentee's wrongdoing. Obviously, where the patents are themselves the consequences of an illegal conspiracy, the appellants will be unable, during

[39] The appropriateness of royalty-free compulsory licensing has been recognized by the parties to consent decrees, several of which antedated the opinion of the court below. *United States* v. *Kearney & Trecker Corp.*, N. D. Ill. Civ. 3337 (1941); *United States* v. *Aluminum Co.*, S. D. N. Y. Civ. 18–31 (April 1942); *United States* v. *General Electric Co.*, N. J. Civ. 1364 (Westinghouse Decree, April 1942); *United States* v. *Aqua Systems*, S. D. N. Y. Civ. 19–516 (November 1942); *United States* v. *Aerofin Corp.*, S. D. N. Y. Civ. 20–458 (March 1943).

the life of such patents, to show that such consequences "will have been fully dissipated." All the fruits of the patents, throughout their lives, will be attributable to the unlawful conduct. In such circumstances, since the effect of the conspiracy will not disappear until the patents expire, it is entirely consistent with the doctrine of the above cases to have no time limitation upon the unenforceability of appellants' patent rights."[94]

This is as true of the acquired patents as of those which issued from the Patent Office as a result of the conspiracy.[95] Hartford concedes that if some patent *acquisitions* by it are held to have been unlawful, it "would be willing to dedicate these acquired patents to the public or to agree not thereafter to enforce them against others" (Br. 142). This obviously recognizes that to the extent that any patents were unlawfully acquired, free compulsory licensing, or the equivalent—dedication to the public—is an appropriate remedy. Inasmuch as all of the pat-

[94] In *Keystone Driller Co.* v. *General Excavator Company*, 290 U. S. 240, this Court did not suggest that the disabling effects of the patentee's fraud in obtaining the patent could be removed during the term of the patent.

[95] The Peiler stuffing patent involved in the Third Circuit, and the Peiler heated hood, and the Steimer patents involved in the Court of Appeals for the District of Columbia were obtained from the Patent Office as a result of the combined activities of Hartford and Owens in using the Clarke article, suppression of the Hitchcock demonstration, and other reprehensible tactics. (See, *supra*, pp. 44 et seq., 62 et seq., 76 et seq.)

ents owned by Hartford, however obtained, were employed to strengthen the power of the combination, there is no basis for differentiating between them. Many of these patents are technically supplementary to the allegedly "basic" patents which resulted from the conspiracy in the Patent Office, and all of them related to the same interrelated group of machines."[96] In *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, a plaintiff who had obtained a judgment of infringement upon one patent obtained from the Patent Office through illegal practices, brought additional infringement suits upon this and four other patents on the same machine. In holding that the illegal practices barred him from maintaining the subsequent suits *even as to the four other patents*, this Court said, at page 246:

> Neither the plaintiff's corruption of Clutter in respect of the first Downie patent nor its use in these cases of the Byers' decree can fairly be deemed to be unconnected with causes of action based on the other patents.
>
> His bills show the devices covered by the five patents to be important, if not essential, parts of the same machine. And its claims warrant the inference that each supplements the others * * *.

[96] Even the suction patents of Owens, which were not licensed to Hartford, were a part of the pool because employed through a common understanding to divide the suction and feeder-former licensing in the industry between Owens

2. *Royalty-free compulsory licensing in the circumstances of this case is lawful*

Appellants do not deny that royalty-free compulsory licensing is an effective means of remedying the violations of the Sherman Act charged to them, nor do they suggest any other remedy that will be adequate. If compulsory licensing were limited to acquired patents, as suggested by Hartford (Br. 142), the judgment would, of course, fail to neutralize the monopoly. This is a remedy that they had deliberately prepared to meet and of which H. K. Smith had written that "we will be in a better position even with such dissolution than it would be otherwise" (Ex. 76, R. 12574).

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and Hartford. Carter, of Owens, wrote Smith in January 1932 (Ex. 631, R. 13290):

> In recognizing your dominant interest in the feeder field, you will recall that we were very careful to insist on our own dominant position in the suction field, and I do not think I am giving away any secret when I say that the interests which control this company, both those which were originally attached to the old Owens organization, and those which have come into control through the Illinois Glass merger, are still decidedly jealous of anything that looks towards an invasion of this field by others, including yourselves.

Appellant Peiler testified at the trial below (R. 4689):

> Q. Well now, this much is clear: that you understood, as you just said, that Owens would take the suction field, and your company would take the gob field?
>
> A. Yes.

Appellants' principal argument is not that the remedy is ineffective, but that it is "confiscatory," which we presume means unconstitutional, and also that it does not fall within the intent of Congress. Both of these suggestions are without merit.

(a) *The intention of Congress.*—Appellants do not deny that Congress, in the Sherman Act, has authorized the courts to render decrees which will effectively prevent violations of the law, nor, as we have pointed out, that the present decree will have that effect. Their contention is simply that Congress has not adopted various proposals which would have required the forfeiture of patents for violation of the antitrust laws, and that this shows that the courts are without power to avail themselves of this type of remedy even when otherwise necessary.

The proposals referred to would have required compulsory licensing either by all, or by specified classes of, patentees, or given the courts broad power to cancel patents for any violation of the antitrust laws in the patented article;[87] thus they were intended to do more than merely permit the courts to control the use of patents to the extent necessary effectively to prevent a continued violation of the Sherman Act. The courts already

[87] See the bills cited in Hartford's brief, pp. 125 and 158, and Owens' brief, p. 147.

possessed and had exercised the general power to take any necessary action,[97a] and there is no reason to assume that their power was any less as applied to patents than it was when applied to property rights or privileges. Nor is it reasonable to believe that the failure of Congress to pass these bills was

[97a] It is, moreover, contemplated by the Sherman Act that in working out the boundaries of necessary action, the Court shall apply the common law method of developing new standards through decisions based on changing states of fact. If it is this process to which appellants refer when they talk of judicial legislation, it suffices to note that there is no novelty or impropriety about it. The comments of Judge Learned Hand in *United States* v. *Associated Press* (N. Y. Times, Oct. 7, 1943, p. 16) are pertinent in this connection. He said:

"Certainly such a function is ordinarily 'legislative'; for in a legislature the conflicting interests find their respective representation, or in any event can make their political power felt, as they cannot upon a court. The resulting compromises so arrived at are likely to achieve stability, and to be acquiesced in: which is justice. But it is a mistake to suppose that courts are never called upon to make similar choices: i. e., to appraise and balance the value of opposed interests and to enforce their preference. The law of torts is for the most part the result of exactly that process, and the law of torts has been judge-made, especially in this very branch. Besides, even though we had more scruples than we do, we have here a legislative warrant, because Congress has incorporated into the anti-trust acts the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard for each case.

"Congress might have proceeded otherwise; it might have turned the whole matter over to an administrative tribunal, as indeed to a limited extent it has done to the Federal Trade Commission. But, though it has acted, it has left these particular controversies to the courts, where they have been from very ancient times."

intended to decrease the existing powers of the courts in this respect."

The decision below imposes the requirement of royalty-free compulsory licensing only because appellants, in combination, have established such a complete system of control over the industry through their patents that relief less drastic would be wholly inadequate. None of the proposed bills detracts from the original powers of a court of equity to accomplish that result; their effect would have been to give to the courts broader powers to forfeit patent rights.

Appellants contend that various provisions of the judgment are penal and accordingly not justified by the provision of the Sherman Act providing for injunctive relief. This argument misconceives the purpose of the judgment. The relief is not intended to penalize the defendants but to remove the effects of the violations of the law for which the appellants are responsible. If the provisions of the judgment are necessary and appropriate to accomplish that result, the fact that they might adversely affect the financial interests of appellants is of no significance. Since remedies under the Sherman Act, like those under similar remedial acts, are designed to "vindicate public,

" In *Standard Oil Co.* v. *United States*, 221 U. S. 1, it was held that the test of "reasonableness" should be applied to restraints of trade alleged to be in violation of the Sherman Act, notwithstanding, as appears from the dissenting opinion, that a bill to modify the Sherman Act in such respect had failed to pass Congress (221 U. S. at 97).

not private rights" (*Virginia Electric and P. Co.* v. *N. L. R. B.*, 63 Sup. Ct. 1214, 1220), an injunctive order which vindicates public rights cannot justly be attacked "as penal or as a mass tort" because certain members of the public directly harmed by the wrongful acts of the enjoined derive a direct benefit from the judgment at the expense of the enjoined.

(*b*) *Confiscation.*—When appellants assert that the decree "confiscates" their patent rights, we assume that they are invoking the protection of the Fifth Amendment against the taking of their property without just compensation and without due process of law.

(1) *As to property generally.*—Even if we assume that a patent right is to be regarded as in all respects subject to the same protection as the normal species of property, this argument is plainly without substance. All property rights are subject to regulation under the police power in the interests of the safety, health, morals, and general welfare of the people (see *Barbier* v. *Connally*, 113 U. S. 27, 31; *Lawton* v. *Steele*, 152 U. S. 133, 136), and the United States "possesses whatever police power is appropriate to the exercise of any attributes of sovereignty specifically granted to it by the Constitution." See *United States* v. *Gaffney*, 10 F. (2d) 694, 696 (C. C. A. 2); *Nebbia* v. *New York*, 291 U. S. 502, 524; *United States* v. *Rock Royal Cooperative*, 307

U. S. 533, 569; *United States* v. *Darby*, 312 U. S. 100, 114, 116.) An impairment of the value of property by the enforcement of a valid regulatory statute is not a taking in the constitutional sense (*Monongahela Bridge Co.* v. *United States*, 216 U. S. 177; *Bedford* v. *United States*, 192 U. S. 217),[9] and this is true even if the effect of the regulation is to deprive property of all or substantially all its value (*Lawton* v. *Steele*, 152 U. S. 133; *Mugler* v. *Kansas*, 123 U. S. 623, 664, 668–9; *Hadacheck* v. *Los Angeles*, 239 U. S. 394; *Omnia Commercial Co.* v. *United States*, 261 U. S. 502).[1] The Court has recognized that the limitations of the Fifth Amendment are "plainly irrelevant" in respect to the deprivation of property rights ensuing as a result of enforcement of the Sherman

[9] Compulsory divestiture of securities under the Public Utility Holding Company Act, § 11 (b) (49 Stat. 820–1, 15 U. S. C. 79K (b)), was held not to constitute a taking in the constitutional sense, even if it involved liquidation by sale, with consequent loss in values. *North American Co.* v. *Securities & Exchange Commission*, 133 F. (2d) 148, 154 (C. C. A. 2), pending on special calendar, No. 6 this Term.

[1] Antitrust judgments resulting in severe deflation of monopoly values were entered in *United States* v. *American Tobacco Co.*, 221 U. S. 106 (decree reported in 191 Fed. 371, 417 (S. D. N. Y.)); *United States* v. *E. I. du Pont de Nemours & Co.*, 1 *Decrees and Judgments in Federal Antitrust Cases*, 195; and *Continental Insurance Co.* v. *United States*, 259 U. S. 156, all of which were litigated cases. Cf. *United States* v. *Southern Pacific Co.*, 259 U. S. 214, 241.

Act. *United States* v. *Joint Traffic Association*, 171 U. S. 505, 571.[3]

(2) *As to patents in particular.*—Because of its nature as a franchise granted by the sovereign, the property of the patent is inherently subject to curtailment for any misuse of the patent that defeats the constitutional nature of the grant. There is nothing in the fact that a patent is property which implies that all of the advantages of ownership attaching to land or other forms of property attach also to patents. Cf. Holmes, J., dissenting, in *Truax* v. *Corrigan*, 257 U. S. 312, 342–3. In fact, this court has long recognized that the enforcement of patent rights stands on a different footing from that of other property rights.

As a privilege granted by the sovereign, a patent has often been characterized as a franchise.[4] As stated in *Public Service Commission* v. *Havemeyer*, 296 U. S. 506, 515:

> Implied in every grant of franchise is the condition that it may be lost by mis-

[3] Appellants have not suggested that a statute that forfeits patents for violation of the antitrust laws would be unconstitutional.

[4] *Seymour* v. *Osborne*, 11 Wall. 516; *United States* v. *United Shoe Machinery Corp.*, 258 U. S. 451, 463; *Bloomer* v. *McQuewan*, 14 How. 539; *Cammeyer* v. *Newton*, 94 U. S. 225, 226; *Swindell* v. *Youngstown Sheet & Tube Co.*, 230 Fed. 438, 442 (C. C. A. 6). Frank, J., concurring in *Aero Spark Plug Co.* v. *B. G. Corp.*, 130 F. (2d) 290, 293 (C. C. A. 2); cf. *Lillard* v. *Lonergan*, 72 F. (2d) 865, 870 (C. C. A. 10), certiorari denied, 293 U. S. 6[illegible].

> use * * *. It may be canceled or withdrawn by any procedure that is not repugnant to the established principles of justice.

Cf. *Farmers' Loan and Trust Co.* v. *Galesburg*, 133 U. S. 156, 179; *Delmar Jockey Club* v. *Missouri*, 210 U. S. 324, 333–4; *New York Electric Lines* v. *Empire City Subway*, 235 U. S. 179, 194; *Kern River Co.* v. *United States*, 257 U. S. 147. Franchises, even when granted by a state, may be regulated by Congress under its power to regulate interstate commerce. *United States* v. *Joint Traffic Assn.*, 171 U. S. 505, 570; *New York* v. *United States*, 257 U. S. 591.[1] *A fortiori* is this true of a franchise granted by the United States.

That this Court deems that the property in a patent, like that in a franchise, is subject to curtailment for misuse in a manner injurious to the public interest from which it stems is shown by the following statement in *Altoona Theatres* v. *Tri-Ergon Corp.*, 294 U. S. 477, 493:

> misuse of the patent, or a part of it, by the patentee in such manner as to mislead the public or operate to its detriment, deprives the claim of the benefit of the patent laws.

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[1] It has also been held that the states in the exercise of their police power, may constitutionally deprive patent owners of the value of their patent rights by prohibiting the manufacture and sale of commodities covered by the patents. *Patterson* v. *Kentucky*, 97 U. S. 501; cf. *Allen* v. *Riley*, 203 U. S. 347; *John Woods & Sons* v. *Carl*, 203 U. S. 358; *Ozan Lumber Co.* v. *Union Co. National Bank*, 207 U. S. 251.

Any other construction, where patent rights have been abused as in the instant case, would hamper Congress in its power to regulate interstate commerce.

As far back as 1856, it was recognized that the exclusory privileges of a patent could not be permitted to embarrass the public interest. In holding in *Brown* v. *Duchesne,* 19 How. 183, that the use of a patented improvement on a foreign vessel while coming into or going out of a United States port was not an infringement of the rights of the American patentee, this Court, through Mr. Chief Justice Taney, said (p. 198):

> * * * it is impossible to suppose that Congress in passing these laws could have intended to confer on the patentee a right of private property, which would in effect enable him to exercise political power, and which the Government would be obliged to regain by purchase, or by the power of its eminent domain, before it could fully and freely exercise the great power of regulating commerce, in which the whole nation has an interest.

The same view of the limitations attached to the property in a patent was taken in the *Morton Salt* case, *supra.* The respondent (plaintiff below) there, relying upon the usual equity rule, argued (314 U. S., at 492–3) that "the clean hands doctrine" applies "only to the plaintiff's wrongful conduct" in the particular transaction which raises

the equity. Cf. *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240. Respondent's wrongful conduct in controlling unpatented products was clearly collateral to the issue of whether the petitioner was a direct infringer of its patents; and none of respondent's activities had harmed the petitioner, since the parties were assumed not to be in competition. In holding that a court of equity would not lend its aid to protect the patent monopoly in such circumstances, this Court pointed out that this was not an ordinary suit involving "private interests" but one which "concerns the public interest as well" (p. 493).[6]

Hence the basis of the *Morton Salt* decision was not only an extension of the clean hands doctrine,[7] but also a refusal to permit the suit to become "a contributing factor in thwarting the public policy underlying the grant of the patent" (p. 494; cf. p. 492). As this Court stated (p. 494):

[6] There is no doubt that respondent would have prevailed in the *Morton Salt* case if he had been seeking to enforce rights in an ordinary contract (*Olsness* v. *Home Insurance Co.*, 14 F. (2d) 907 (C. C. A. 8)) or in real estate. If, for example, respondent had sought to enjoin a stranger from repeated trespasses upon his land, it would not have been a good defense to show that respondent was using his land or buildings thereon to restrain the trade of others, even if the restraint were a violation of the antitrust laws. *Wilson* v. *Sullivan*, 25 Ky. L. 1110 (1903). Cf. *Fowler* v. *Harrison*, 39 Wash. 617 (1905); *Schwartz* v. *McQuaid*, 214 Ill. 357 (1905).

[7] Commentators regard the *Morton Salt* case as going somewhat further than the traditional "clean hands doctrine." See Wood, *Patents and Antitrust Laws* (1942), 93–4; (1942) 51 Yale L. J. 1012; (1942) 42 Col. L. Rev. 882.

> The patentee, like these other holders of an exclusive privilege granted in the furtherance of a public policy, may not claim protection of his grant by the courts where it is being used to subvert that policy.[8]

Thus, in its most recent statement on the subject, this Court has assimilated the property in a patent franchise to that in other franchises and indicated that a patentee has no rights when he abuses the patent privilege. That the conduct of appellants was sufficient to place their patents in this vulnerable and unprotected position has been amply shown.[9]

(3) *Nothing of value was taken.*—Even if we should assume, *arguendo*, that there was a taking, appellants lost nothing of recognizable value. The *Morton Salt, B. B. Chemical* and *Keystone Excavator* cases demonstrate that a patentee who has

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[8] Cf. *Pan American Co.* v. *United States*, 273 U. S. 456, 509. Cf. also *Hofferman* v. *Simmons*, 290 N. Y. 449 (1943), in which relief was denied in a suit to recover money taken from gaming rooms by police during a raid on the ground that plaintiff could not show good title or possession to the money in view of the fact that it had been used for illegal gaming. Accord: *Dorrell* v. *Clark*, 90 Mont. 585 (1931).

[9] Other cases in which the patent privilege was held to have become unenforceable on account of its use to subvert rather that promote the progress of trade and the arts are *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U. S. 502; *Carbice Corp. of America* v. *Am. Patents Develop. Corp.*, 283 U. S. 27; and *Leitch Mfg. Co.* v. *Barber*, 302 U. S. 458. One court has even gone the length of holding that such misuse of the patent privilege renders the claim of the patent void. *Pfister* v. *Dyar*, 59 U. S. P. Q. 91 (S. D. Ill.).

violated the antitrust laws or abused his patent privileges by improper conduct has no right to enforce the patents in equity until the effect of his unlawful conduct has been fully dissipated. As we have shown (*supra,* pp. 346–8), the effect of appellants' scheme here will run at least to the expiration of the present patents.

It thus appears that appellants would no longer have available to them the remedies in equity customarily used by a patentee, including the right to damages for infringement. *National Lock Washer Co.* v. *George K. Garrett Co., Inc.,* 137 F. (2d) 255 (C. C. A. 3); cf. *Pfister* v. *Dyar, supra,* fn. 9, p. 359. Furthermore, it would have been against public policy to permit appellants to recover at law for the use of the machines or patent rights. (See 5 *Williston on Contracts* (Rev. Ed. 1936), p. 4562; 6 *id.* p. 4988). No compensation is paid in eminent domain proceedings for values created by past or potential future illegal uses of the property. *Joly* v. *Salem,* 276 Mass. 297 (1931). Hence appellants, through their illegal practices with respect to their patent rights, had rendered the patents unenforceable prior to the judgment in the instant case. The value of patent rights lies in the power to exclude others from the field, and if this is lost the patent has no legally recognizable value. A nuisance value at most remains, and although this may be considerable, inasmuch as a threat of a lawsuit is in itself a potent weapon, it can hardly be said to be protected by the Fifth Amendment.

B. COMPULSORY LICENSING IS PROPERLY IMPLEMENTED BY INJUNCTIONS AGAINST ENFORCEMENT OF PATENT RIGHTS

Paragraph 26 of the judgment (R. 7669) enjoins appellants from bringing infringement suits, attempting to interfere with the possession of machinery in the hands of licensees, and attempting to collect royalties, license fees, or profits for the use of patented inventions until the entry of a finding by the district court that the consequences of the illegal conduct have been fully dissipated.[11] The object of this paragraph, like that of paragraph 24, is to protect the public, and especially other glassware manufacturers, against appellants' continued use of the patent rights unlawfully obtained. The prohibitions against suits by the appellants implement the provisions for royalty-free compulsory licensing. The latter provisions by themselves would have left appellants free to enforce their patent rights in certain circumstances in contravention of the principles laid down in the *Morton Salt* and *B. B. Chemical* cases.

[11] Paragraph 26 of the judgment (R. 7669) merely enjoins suits to enforce patent rights or attempts to interfere with possession of machinery under license or lease at the time of the judgment. Appellants are left free to enforce property rights in the equipment to be sold as provided in the judgment; and if a licensee should refuse either to buy or surrender possession of the machinery which it held as lessee at the time of the judgment, appellants would be free to recover damages for its conversion, despite Hartford's contention to the contrary (Br. 145).

While agreeing to grant royalty-free licenses, appellants, if not otherwise restrained, might find the means of enforcing such patent rights by collecting damages for alleged past infringement, by interfering with the possession of leased machinery in the hands of their licensees, or by collecting royalties, license fees, or profits for past use of the inventions. The *Morton Salt* and *B. B. Chemical* cases require the avoidance of all of these possibilities.[12]

[12] The principle of the *Morton Salt* and *B. B. Chemical* cases is not limited to suits in which the patent holder has required the use of unpatented materials with the patented invention. As stated in *United States* v. *Univis Lens Co.*, 316 U. S. 241, 251–2, in giving—

"effect to the public policy which limits the granted monopoly strictly to the terms of the statutory grant, *Morton Salt* v. *Suppiger Co.*, 314 U. S. 488, the particular form or method by which the monopoly is sought to be extended is immaterial."

The principle of the *Morton Salt* and *B. B. Chemical* cases was recently applied to a case where the defendant licensee had agreed with the plaintiff licensor that the former would not manufacture any articles except those covered by the license. *National Lock Washer Co.* v. *George K. Garrett Co., Inc.*, 137 F. (2d) 255 (C. C. A. 3). Cf. *General Electric Co.*, v. *Hygrade Sylvania Corp.*, 45 F. Supp. 714 (S. D. N. Y.), in which the alleged illegality of the use of the patents was in respect to the antitrust laws.

[13] Because Ball and Thatcher helped materially to place Hartford, Owens, and Corning in a dominant position, they are partially responsible for the present situation by which research and development in the glassware and glassware machinery interests are concentrated in the hands of a few.

C. COMPULSORY LICENSING AT A REASONABLE ROYALTY WAS PROPERLY EXTENDED TO FUTURE PATENTS—PARAGRAPH 24(B)

As a result of the success of the conspiracy, research activities in the glassware industry were largely, if not entirely, carried on by appellants, Corning, Hartford, Owens, Hazel, and Lynch.[14] Indeed, there is evidence that indicates that the effect of the appellants' arrangements had been to discourage to some degree research even by Owens and Hazel (see pp. 58, 263–4, *supra*), at least in those fields in which Hartford asserted that its patents were dominant. The smaller independent machinery manufacturers whose activities might have provided an opportunity or incentive for research or invention have been bought up by appellants and their businesses absorbed or liquidated. The smaller licensees, who, in most cases, had never been in the machinery business, had little opportunity to invent; they lacked the resources, the access to information, and the experience that modern research requires. Even more important, their incentive to invent had been destroyed by the license provisions that required them to transfer all improvements on the licensed machines to Hartford and to acknowledge in broad terms the validity of all of Hartford's present and future patents. Thus, the illegal conduct of appellants had not only given them control of the existing technology of the industry, but it had also placed them in a

position where they could reasonably expect to control the future of that technology. Certainly no independent person now starting to work in that field could expect to compete with the appellants on equal terms for years to come.

No bare prohibition of past misconduct could remedy this situation. Obviously, the dissolution or disintegration of the specialized research and development organizations would be difficult and perhaps undesirable. The provisions of the decree that limit the use of existing patents and applications do not affect the power of the appellants to deal as they wish with the applications they may file or the patents they may obtain in the immediate future. These applications and patents, even though not yet in existence, present a danger that is immediate in a very real sense. The judgment can hardly achieve its purpose if the day after it is entered the appellants are free to begin in the Patent Office a new campaign for dominance in which they can use all the power their present control of research and technology gives them. This power would present real dangers to the objects of the judgment even if the appellants avoided the cruder forms of misconduct in the Patent Office that are now enjoined.[14]

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[14] Hartford in the past has manifested "unusual opposition" to a proposal to make available to licensees any new invention which might replace the presen type of feeders (Ex. 1272, R. 13868).

There is, therefore, a need for relief in connection with appellants' future patents. The court's requirement that appellants give unrestricted licenses at reasonable royalty rates under their future patents to all applicants was a reasonable way of doing this. As stated by Judge Learned Hand in *United States* v. *Corn Products Refining Co.*, 234 Fed. 964 (S. D. N. Y.), appeal dismissed, 249 U. S. 621, at p. 1018:

> Yet it is a reasonable assurance to take that, when an innate proclivity has so abundantly manifested itself over a period of years, it shall be disabled from further opportunity.

The plan adopted prevents appellants from using their present power to perpetuate control of the industry and at the same time permits them to obtain a reasonable reward from the exploitation of their patents.[15] It also permits the research and development organizations to continue intact.

Appellants contend that the exclusion of others from the right to make, use, and vend inventions covered by future patents is an innocent attribute of the patent grant and that its exercise cannot

[15] Corning complains (Br. 59–60) that paragraph 24 (b) compels it to license its future patents "so long as it continues to do business" and "would cover every device that Corning may invent in the far-distant future." There is no reason to suppose that the district court will continue this provision of the decree in effect if the time comes when the competitive situation is such that appellants cannot reestablish industrial control.

properly be enjoined. But acts innocent *per se* are properly enjoined if they are steps in a conspiracy. *Swift & Co.* v. *United States,* 196 U. S. 375; *Chamber of Commerce* v. *Federal Trade Commission,* 13 F. (2d) 673 (C. C. A. 8). It follows that they may be properly enjoined if they present a threat of a renewal of the conspiracy or of other acts of illegal monopolization, or if that action is necessary to nullify the illegal domination the conspiracy has created. The judgment must be molded to meet the danger of subtle moves to circumvent it. Cf. *Union Pacific R. Co.* v. *United States,* 313 U. S. 450, 470. It is settled that antitrust judgments may enjoin not only repetitions of the illegal practices shown to have occured in the past, but also the performance of similar or related acts in the future. *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, 308; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 77–8. The reason for this requirement was succinctly stated in *Labor Board* v. *Express Pub. Co.,* 312 U. S. 426, 436–7.[10] In *Local 167* v. *United*

[10] The Court there said:
"Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts * * *. The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past."

States, 291 U. S. 293, 299, it was held that—

> Having been shown guilty of coercion in respect of the coops in which poultry is kept and fed, appellants may not complain if the injunction binds generally as to related commodities including feed and the like.

Similarly, in *Hershey Chocolate Corp.* v. *Federal Trade Commission,* 121 F. (2d) 968 (C. C. A. 3), in upholding a cease-and-desist order of the Federal Trade Commission relating to unfair practices in connection with several confectionery items, whereas the complaint was limited to one item, the court said, at pages 971–2:

> To be of any value the order must proscribe the methods of unfair competition as well as the specific acts by which it has been manifested.

Cf. *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.,* 312 U. S. 287, 294; *Oregon and California R. R.* v. *United States,* 238 U. S. 393, 436–9.[17]

In *United States* v. *E. I. du Pont de Nemours & Co.,* 1 *Decrees and Judgments in Federal Anti-trust Cases,* 195 (D. Del.), new competing companies were created and du Pont was required for at least five years to furnish each of two new corpora-

[17] It is not uncommon, under state statutes, to grant injunctions closing an entire business or place for all purposes, where there has been a violation in respect to a particular purpose. See note (1937), 16 N. C. L. Rev. 33.

tions various facilities and information in reference to "experimentation, development of the art and scientific research," and other matters upon reasonable terms. The court there recognized that the new companies would be unable to develop their research facilities to compete with those of du Pont without some such provision and that du Pont would otherwise be rewarded for its own wrongdoing. The same principle applies to the conspirators in the instant case.

In *Standard Oil Co.* v. *United States,* 283 U. S. 163, this Court recognized by implication that compulsory licensing of this nature could be granted, when it said (p. 172):

> Unless the industry is dominated, or interstate commerce directly restrained, the Sherman Act does not require cross-licensing patentees to license at reasonable rates others engaged in interstate commerce.[18]

[18] *F. A. D. Andrea, Inc.* v. *Radio Corp. of America*, 14 F. Supp. 226 (D. Del.), affirmed, 88 F. (2d) 474 (C. C. A. 3), certiorari denied, 300 U. S. 681, and *Radio Corp. of America* v. *Hygrade Sylvania Corp.*, 10 F. Supp. 879 (D. N. J.), both decided before the Supreme Court decisions in the *Morton Salt* and *B. B. Chemical* cases, refused to apply this statement of the Supreme Court to permit a private person to force a patentee to grant it a license. These cases are not applicable, of course, to a situation where the United States is seeking compulsory licensing as a means of dissolving monopoly power under the Sherman Act. In the *Andrea* case, the Court, in distinguishing the above-quoted statement of the Supreme Court, said (p. 228) that the suit in the *Standard Oil* case—

The instant case, of course, is a clear example of domination by cross-licensing patentees and the imposition of direct restraints upon interstate commerce.

D. APPELLANTS WERE PROPERLY ENJOINED FROM ACQUIRING, EXCEPT FROM THE PATENT OFFICE, OTHER THAN NON-EXCLUSIVE RIGHTS UNDER PATENTS COVERING CERTAIN INVENTIONS

Paragraph 51 of the judgment (R. 7686) enjoins defendants (excluding the Association group) from acquiring, except from the Patent Office, other than nonexclusive patent rights—

> covering any invention embodied or employed in a machine or process used or to be used in the manufacture of glassware (whether or not the machine or process embodying or employing the invention covered by the patent can be used without infringing another patent or patents) which constitutes or employs, in whole or in part, a method, means, or process to obtain re-

"was brought by the United States against defendants for violation of the Sherman Act. A private individual was not seeking a license."

In the *Hygrade Sylvania* case, the plaintiff was denied compulsory licensing because the Court held that the Sherman Act remedies are exclusive and do not provide for suit *by a private party* to obtain such relief. It should be noted, however, that the Sherman Act does provide for suit *by the United States* "to prevent and restrain" violation of the Act.

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> sults in the glass-making art which are identical with, similar, or alternative to those obtained or obtainable by the machinery, methods, or processes embodying inventions covered by patents then owned or controlled by said defendant, * * *.[19]

The provisions of this paragraph are based on the established principle that defendants in an antitrust case may be enjoined from a repetition of their illegal acts. The question is not whether the purchase of patents covering competing inventions is illegal in and of itself, but whether the appellants, who have been proved guilty of engaging in a conspiracy to acquire such patents for the purpose of establishing an illegal patent pool for use in controlling the market for an unpatented product, shall be enjoined from acquisitions conducive to a repetition of similar schemes. In view of their past record, it cannot be assumed that their purpose in engaging in any such acquisitions in the future will be innocent. Hartford alone acquired from sources other than the Patent Office no less than 317 different patents (Ex. H–6103, R. 11046). A list showing the date and source of the acquisition of the more important of them

[19] This provision is not to apply to patents covering inventions of appellants' employees made during the time of their employment.

appears in Appendix, Section VI, Sched. A, pp. 427–428.[39]

We have already shown that under the circumstances of this case the appellants' activity in building up the patent pool by the acquisition of patents was illegal whether or not the acquired patents were in conflict with patents previously in the pool (*supra*, pp. 215–6). We have also shown that the pool was not legalized by the fact that some of the patents covered complementary inventions (*supra*, pp. 216–8). Hence, in restraining a repetition of the acts complained of, it is not necessary to confine the injunction to non-conflicting patents or to non-complementary inventions.

The necessity for Par. 51 of the judgment is not removed by the compulsory licensing provisions of Par. 24 (R. 7667). Par. 51 is necessary to prevent appellants from acquiring from third parties patents under which they would otherwise be allowed the privilege of collecting royalties by Par. 24 (b). Equity should not accord them the privilege of realizing royalties from purchased

[39] Owens contends (Br. 181) that paragraph 51 defeats the purpose of the Sherman Act because it restrains Owens from acquiring certain inventions while leaving other non-defendant glassware manufacturers free to do so. This argument disregards the past history of the conspiracy and the propensity of the appellants to acquire inventions for monopolistic purposes. It is to prevent Owens from strengthening the dominant position achieved in violation of the Sherman Act that injunction against further acquisition of patents is necessary.

patents covering inventions similar or alternative to inventions covered by their previously owned patents. The pool is large enough, and the time has come when its enlargement through further acquisitions should be stopped.

Appellants' rights are amply protected by their freedom to take out new patents covering inventions of their own employees and to obtain non-exclusive licenses under the patents of third persons.

E. THE JUDGMENT PROPERLY NEUTRALIZES ILLEGAL FEATURES OF THE LICENSING SYSTEM

1. *Leasing of equipment.*

Appellants engaged in the distribution of glassware-making machinery are enjoined from distributing the same otherwise than by outright sale (Jdgt., par. 21, R. 7665); and as a condition of employing the channels of interstate commerce, are required to agree to offer to sell machinery to any applicant upon reasonable and equal terms (Jdgt., par. 23, R. 7666). Hartford is further required, as a condition of distributing glassware-making machinery in interstate commerce, to offer to sell to its lessees, at reasonable prices, machinery now leased to them (Jdgt., par. 22, R. 7666). The licensees are to be offered new licenses upon terms to be approved by the court, and all existing Hartford leases and licenses are cancelled (Jdgt., par. 28, R. 7671).

These provisions are necessary for the abolition of the licensing system required by the decisions in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436[21] and *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254. They effectively neutralize the monopoly power inherent in that system, which the district court held was "the greatest abuse" (Op. R. 158). Hartford's power to deprive licensees of their machinery for violation of the terms of the license and lease agreement was the power to put them out of business completely. Even with compulsory licensing, a continuation of the right to deprive licensees of their existing equipment would maintain in Hartford's hands the power so seriously to affect a licensee's business as to continue Hartford in a position of dictatorship over the industry. Compulsory licensing protects outsiders from the threat of infringement suits and relieves present licensees of the burden of unconscionable royalties; but it entitles no one to the use of equipment distributed by Hartford. The necessity of duplicating at his own expense Hartford's machinery, especially under wartime conditions, renders the threat of the removal of existing equipment a most serious one to the average manufacturer.

[21] As stated in that case (p. 461):

"Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightly suppressed it even though it had been or might continue to be used for some lawful purposes."

The requirement that appellants sell rather than lease their machinery is supported by *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E. D. Pa.), in which the Pullman Company, which had insisted on a strict leasing system and had previously refused to sell its cars to railroads, was required, by a three-judge court, to sell used sleeping cars to the railroads.

Hazel complains (Br. 65) of the provision of the injunction prohibiting the leasing of machines. Certainly Hazel and others of the appellants not now engaged in the business of distributing glass-making machinery will not be affected by the injunctions of Par. 21 unless they decide to go into that business. In that event, the paragraph is merely designed to prevent them from themselves setting up a licensing and leasing system to take the place of that which they combined with Hartford to establish. Isolated sales of obsolete or surplus equipment would not be affected, in view of the fact that paragraph 21 is confined to those of the appellants who "engage in the business of distributing machinery."

Hazel criticizes the provision of Par. 23 requiring sales to be on equal terms on the ground that the costs might have greatly increased or decreased between sales. The language should not be interpreted, however, to mean more than that prices and terms to all applicants shall be equal *under the same circumstances.* Read in the light

of Par. 25 enjoining discrimination between companies, it is clear that the provisions of Par. 23 are intended to prevent the imposition of discriminatory terms and not to prevent changes in prices, provided such changes reflect genuine changes in costs or market conditions and are applied equally to all applicants.

Hartford contends (Br. 144) that because Par. 22 provides that in determining the reasonable price at which Hartford shall sell to the lessees Hartford equipment now in their hands under lease there shall be taken into consideration the license fees and royalties theretofore paid to Hartford by the lessee, Hartford's machines are "confiscated." The language of Par. 22 carefully avoids stating that the license fees and royalties are to be deducted from the value of the machines plus a reasonable profit in determining what should be a reasonable price. It is merely required that these factors shall be taken into consideration. They are not to be used to vitiate the standard of "reasonable prices" which has been laid down. What a fair valuation for those machines will be cannot now be ascertained; but there is no warrant for inferring that the price could be confiscatory. If the court should ever fix a price which appellants deem confiscatory, they will have a proper remedy at that time.

2. *Injunction against express contract provisions that licensees shall not contest validity of patents*

Par. 29 (c) of the judgment (R. 7673) enjoins each appellant other than the Association group from entering into any agreement which expressly provides that any licensee shall not contest the validity of any patent of such appellant. Many of the contracts and licenses required the licensee to concede the validity of existent and future Hartford patents.[22] Even if agreements of licensees acknowledging the validity of the patents under which they are licensed are valid when standing alone, this injunction is necessary to prevent certain illegal forms of such agreements as well as the use of the legal forms as parts of an illegal plan.

Such agreements were among the devices employed to protect patents which appellants had obtained under circumstances not calculated to assure a correct determination by the Patent Office of the issue of patentability. They were also employed to maintain the monopolistic power of the patent pool indefinitely during the life of additional patents successively added thereto. Acknowledgments of validity which go beyond the scope of the license are illegal. *Pope Mfg. Co.* v. *Gormully,* 144 U. S. 224; *Philadelphia Creamery Supply Co.* v. *Davis & Rankin Co.,* 77

[22] See pp. 168–169, *supra.*

Fed. 879, 881, 882 (C. C. N. D. Ill.). This type of agreement appeared in the Hartford license to Capstan (Ex. 808, sec. 12, R. 9264). Covenants acknowledging the validity of future patents would seem clearly to be contrary to public policy and unquestionably unenforceable if the parties dominate the industry. *United States* v. *Standard Oil Co.*, 33 F. (2d) 617, 630 (N. D. Ill.), reversed on other grounds, 283 U. S. 163. Cf. *Pope Mfg. Co.* v. *Gormully, supra.*

3. *Injunction against requirement that rights to improvements by licensees shall become exclusive property of licensor*

We have seen how the device of requiring licensees to transfer to Hartford all rights to improvements in the licensed inventions was used in promotion of the conspiracy and the power of the pool (*supra,* pp. 225–7). This device has the effect of depriving licensees of their incentive to improve upon the leased machines and insures that no user of a machine will patent an improvement impairing the monopoly. If permitted in the future, it would continue to centralize in Hartford's hands the entire incentive and responsibility for improving equipment and processes covered by patents in the pool. Whatever may be the law with respect to contracts for the acquisition of improvement patents generally, the employment of such agreements in support of an illegal licensing system, as here, is in direct contravention of the

constitutional purpose "to promote the progress of science and useful arts." The injunction is eminently appropriate.

4. Injunction against restrictive licensing

The illegality of the licensing system and license restrictions has been discussed *supra,* pp. 239–53. The injunction against restrictive licensing contained in paragraph 29 (a) and (b) of the judgment (R. 7672) would be a proper means of destroying that system, even if some of the restrictions were valid when standing alone. *United States* v. *Univis Lens Co.,* 316 U. S. 241, 254; *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436, 461.[23]

[23] Owens charges (Br. 159) that Par. 30 of the judgment, which enjoins it and other appellants from entering into any agreement with Hartford containing the provisions prohibited by Par. 29, duplicates Par. 29 and that this fact is evidence that the appellee had no expectation that it would be able "to get away with" Par. 29. Owens fails to take account of the fact that Par. 29 only prohibits a defendant in the position of a licensor, lessor, or vendor from insisting upon the insertion or enforcement of one of the enumerated restrictions. This would be insufficient to prevent any of the defendants in the position of a licensee, lessee, or vendee from complying with such insistence upon the part of Hartford. Par. 30 is framed to prohibit the other defendants from submitting to any such restrictions if imposed by Hartford.

Owens also asserts (Br. 156) that the prohibitive restrictions as to (1) kind, weight, color, capacity, or composition of the product produced on licensed equipment, (2) quantity of production, and (3) place of use of the equipment—

Appellants urge that the injunction is too broad because it applies to restrictions relating not only to glassware but also to other products. Certainly, to the extent that the machines covered by appellants' patents relating to glassware can be used in the manufacture of products other than glassware, the injunction is not too broad.[24] Whether the injunction against the use of restrictions properly goes further must depend on the extent to which a court of equity—acting *in personam,* and having the parties before it—feels justified under all the circumstances of the case in having its decree prevent future threats of similar conduct in other fields where, as here, the appellants have shown "an innate proclivity" to violate the antitrust laws (see *United States* v. *Corn Products Refining Co.,* 234 Fed. 964, 1018 (S. D. N. Y.), (appeal dismissed, 249 U. S. 621). In such a case, there should be a broad injunction. *Local 167* v. *United States,* 291 U. S. 293; cf.

"directly affect only the use of the invention itself, i. e., they do not relate to the use of * * * the product resulting from the use of the invention."

It seems too clear for argument that the first two of the above classifications directly affect the market for unpatented glassware by restricting production. In view of the importance of transportation costs, it is clear that the third classification also affects the glassware market.

[24] Fiber glass is specifically excluded from the licensed inventions under the January 14, 1942, Owens-Hartford agreement (Ex. O–6173, R. 9882), thus indicating that the Owens patents could be used in the manufacture of fiber glass which is not glassware within the terms of the judgment.

Labor Board v. *Express Pub. Co.*, 312 U. S. 426, 436; *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 294. This is particularly true where, as in the present case, some of the appellants have substantial patent holdings and are already engaged in business in other fields. Out of a total of 755 unexpired Hartford patents as of December 31, 1941 (Ex. H–6106, R. 11,100), for example, 116 did not relate to glassware-making machinery (Ex. H–5920, R. 10997; R. 6703), as defined in the judgment (Par. 1 (F), R. 7656). There is every reason to believe that a good number of the 598 unexpired patents held by Owens as of December 1, 1939 (Ex. 1597, R. 8221), did not relate to such machinery, since Owens had a substantial business in cans (R. 7930F).[25] Owens and Corning each owns a 50% interest in a corporation engaged in the manufacture of fiber glass. Hartford also was engaged in business outside the glassware field, such as plastics and refractories. Some of its patents relating to the manufacture of glassware are thought to be usable in other industries (R. 6136).

Owens refers to patent restrictions as "partial waivers of the patent monopoly" (Br. 159) and argues that to prevent restrictions is to encourage

[25] The evidence shows that Hartford has owned in all 881 patents (Ex. H–6106, R. 11100), and Owens 817 patents (Ex. 1597, R. 8219).

the patentee to preserve his right of exclusivity in his own field and not to permit the invention to be used in other fields (Br. 162). This is an argument addressed to the public policy of permitting restrictive licensing in general—a question not before this Court. We are here concerned only with the problem as to whether certain appellants who have shown an innate proclivity to misuse the patent privilege in violation of the antitrust laws, shall be enjoined from forms of licensing which will tend to revive the illegal practices. The effect of prohibiting restrictive licensing by law-abiding patentees has no relevancy to the determination of this question. Furthermore, the compulsory licensing provisions of the judgment will, in the instant case, effectively prevent appellants from preserving their right of exclusivity in their own fields.

Appellants complain that the provisions of Par. 29 (f) (R. 7673), prohibiting restrictions which grant to any licensee, lessee, or vendee a preferential position, constitute a Robinson-Patman Act without the protective provisions of that act permitting quantity discounts and the like. This interpretation of subparagraph (f) is unwarranted. This subparagraph, like Par. 23 (R. 7666), is clearly directed against unfair discrimination and should not be interpreted to prevent quantity discounts or variations in terms required by increases in cost or general market conditions.

F. BLOCKING OFF, FENCING IN, AND CONCERTED ACTION IN THE PATENT OFFICE WERE PROPERLY ENJOINED

Par. 52 of the judgment (R. 7687) enjoins certain of the appellants from filing or prosecuting patent applications *for the purpose* of blocking off, fencing in, or hindering the development by others of inventions capable of obtaining similar or alternative results to those obtainable by the patented inventions of the applicant, provided that the applicant *also intends* never to make commercial use of the inventions. It is further provided that failure to make such use of the inventions within four years shall be deemed *prima facie* proof of the presence of the intention never to make use thereof.[26]

In Par. 53 of the judgment (R. 7688) certain of the appellants are enjoined from combining or conspiring to obtain dominating patents covering glassware and machinery inventions from the Patent Office, to conceal pertinent facts from the Patent Office, to transfer conflicting claims between patent applications without a *bona fide* arbitration as to priority, to disclose regularly to one another patent applications or other information about unpatented inventions, to secure information concerning the interferences of others,

[26] To clarify the meaning of these provisos as expressed in the text, appellee has suggested certain minor changes in phraseology. See p. 328, *supra*.

or to delay the issuance of patents for the purpose of avoiding the adverse effect of such patents on previously issued patents.

In par. 54 (R. 7689–90) certain appellants are enjoined from combining or conspiring to harass or delay other applicants in the Patent Office by simultaneously prosecuting interferences or a plurality of applications controlled by parties having a common interest therein, by delaying the recordation in the Patent Office of assignments of patents, by filing "trap" applications, or by conducting friendly interferences for the purpose of retaining the applications in the Patent Office as a means of provoking interferences with other applications.

The practices thus enjoined are the techniques employed by certain of the appellants in furtherance of their conspiracy to eliminate prospective competitors in the Patent Office and to obtain, by fair means or foul, patents for use in controlling both the machinery and glassware industries. The illegality of these practices already discussed (*supra,* pp. 227–39), justifies these injunctions as a means of preventing a repetition of the illegal practices.

Owens complains (Br. 184) that if someone invents one process for making milk bottles, the patenting by another of an alternative process does not "fence in" or "block off" the first patentee any more than if he had never invented his process. This argument ignores the fact that the

whole question as to blocking off and fencing in depends upon the state of mind of the applicant. We do not contend that the taking out of a patent should be enjoined merely because it might hinder or obstruct the development of alternative processes by others. It is the *misuse* of the patent privilege to which appellee objects; and when, as in the instant case, corporations follow a consistent policy of applying for patents not for the purpose of using the inventions, but only for the purpose of preventing their use by others, the constitutional aim to promote the progress of science and useful arts has been defeated and the patent privilege is manifestly abused. In the judgment, the wrongful intent has, therefore, been made a *sine qua non* for the applicability of the provisions of Par. 52.

Quite unjustifiably, Hartford contends (Br. 169–170) that pars. 53 and 54 engraft new conditions upon existing patent law and patent procedure. There are no existing laws that authorize combinations to engage in the conduct proscribed in these provisions. But in any event, this judgment does not purport to deal with anything but the situation before the court in this case, and the injunctions are directed against parties proved to have flagrantly violated the antitrust law. The judgment is intended to prevent a repetition of this violation by these specific appellants, and has no bearing whatsoever upon Patent Office procedure as applied to other persons.

G. THE CONTRACTS AND LICENSE AGREEMENTS WERE PROPERLY CANCELED

Where a combination or conspiracy has found expression in written agreements, courts do more than merely dissolve the combination and enjoin the defendants from entering into like agreements in the future. They also provide for the cancellation of the illegal contracts. This is the familiar remedy in cases involving the use of patent licenses to control or restrain trade in an unpatented article. *United States* v. *Univis Lens Co.*, 316 U. S. 241, 254; *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436. Illegal contracts involving the use of tying clauses in violation of Section 3 of the Clayton Act are commonly canceled by the courts. *United Shoe Machinery Co.* v. *United States*, 258 U. S. 451; *United States* v. *International Business Machine Corp.*, 298 U. S. 131. The fact that licensees under such contracts are not parties to the suit is immaterial. *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451, 456.

In accordance with these well-settled principles, the judgment below cancels the major contracts (Par. 27, R. 7670; Par. 41, R. 7682) and all of Hartford's lease-licenses (Par. 28, R. 7671).

Appellants have misconstrued the language of Par. 31 of the judgment (R. 7673–4) providing that the form of new agreements shall be subject to the approval of the court. Hartford complains that the requirement is so extreme as to prevent

one of the corporate defendants from entering into a contract of employment with one of its own officers, or an individual defendant from purchasing a house from another individual defendant without approval of the court (Br. 174). A fair reading of this paragraph will disclose, however, that it applies only to agreements "made pursuant to this judgment." This paragraph reads as follows (R. 7673–7674):

> 31. The form of any agreement between any of the defendants and of any license agreement made pursuant to this judgment and to which any of the defendants is a party, shall be subject to approval of this Court, on petition by any defendant proposing to enter into such an agreement, on ten (10) days' notice to the Attorney General; provided, however, that it shall be unnecessary to obtain the approval of the Court as to the form of any agreement which is identical (except as to parties, dates, number, and types of machines involved) with any form theretofore approved by the Court.

We believe this provision is limited to (1) agreements between any of the defendants made pursuant to the judgment; and (2) any license agreements to which any defendant is a party made pursuant to the judgment. The evidence of planned evasions of the antitrust laws on the part of the appellants is so strong as to require, for a time at least, that all agreements made between them pur-

suant to the judgment (i. e., those agreements, licenses and other contractual arrangements that appellants make in consequence of or to comply with the provisions of the judgment) shall be submitted to the scrutiny of the court. If this Court believes that the paragraph needs further clarification to express this meaning, we have no objection to its being modified.

H. THE CONTRACTS EXECUTED SUBSEQUENT TO THE SUIT AND AFFECTING THE STATUS QUO WERE PROPERLY CANCELED

As a result of the disclosure at the TNEC hearings of the sharing of royalties by Hartford with Owens and Hazel, Ball had made a claim in 1939 against Hartford for breach of the "most favored nation clause" in its 1933 agreement (Ex. 1228, R. 13816). The filing of the present suit showed that the legality of this agreement was attacked; and Ball, after the trial of this suit had been peremptorily set, entered into a settlement agreement dated August 1, 1940. By this agreement, Ball, in exchange for the surrender of its residual exclusive rights for fruit jars and its claim against Hartford, received $425,000 from Hartford (U. F. 513, R. 7379).

Similar cancellation agreements were executed between Hartford and Lynch (Ex. H–5027, R. 9532) and Hartford, and Corning and Empire (Ex. H–5030, R. 9540; Ex. H–5031, R 9542), either on the threshold of the impending trial or after the

trial date was set and while an effort was being made to settle the case. Hartford agreed to pay Corning $1,125,000 over a period of years, in exchange for which Hartford transferred to Corning three of its important patents.

As an attempt to anticipate the court's decision and preclude appellee from securing adequate relief, these agreements were all subject to cancellation. A party attempting to change the *status quo* during the pendency of a suit seeking an injunction against him always acts at his peril and is subject to the power of the court to restore the *status quo,* wholly irrespective of the merits as they may ultimately be decided. *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1. Persons taking rights in property which is the subject of equity proceedings, during the pendency of those proceedings, do so subject to any decree that may be finally entered in the suit. *Mellen* v. *Moline Iron Works,* 131 U. S. 352.

I. REMEDIES AFFECTING PATENT RIGHTS WERE PROPERLY EXTENDED TO CORNING'S RIBBON MACHINE

The judgment below specifically includes Corning's so-called ribbon machine and patents covering the same (R. 7656). Appellee had offered evidence showing that Hartford had claimed that its Howard auto-blow patent covered the ribbon machine, that Corning disagreed with this contention, and that Hartford and Corning attempted to dispose of the matter by entering into a special

agreement in 1930 by which Corning received a royalty-free license under some of the Howard auto-blow claims, such license being exclusive for bulbs, tubing and cane, and other Corning specialty fields. See ftn. 69, p. 182, *supra*.

The evidence also showed that Hartford had certain rights in the ribbon machine for the container field under the 1922 Hartford-Corning Glass Contract (Ex. 19, R. 8628); and that sometime in 1938 Corning was using the ribbon machine to manufacture tumblers, including tumblers for packers (Ex. C–6119, R. 8570). There was also proof offered by the Government that certain licensees of Hartford were interested in using the ribbon machine for the manufacture of containers, but that licenses from Corning for this purpose were never obtained.[28a]

[28a] Ex. 382, R. 12948; Exs. 1169–70; see Stip. 16531, Appendix, Section III, pp. 421–3; R. 5174. Corning contends (Br. 58–9) that the ribbon machine should not be included in the final judgment and relies principally on the following statement made by counsel for appellee during the trial:

> We have never claimed any combination of patents involving the ribbon machine, as far as I know (R. 5105).

This statement was made in a long colloquy as to the admissibility of Corning's patent on the ribbon machine. The Government's objection to the admission of the patent was overruled, and the patent admitted for the purpose of showing Corning's state of mind in connection with its controversy with Hartford as to the Howard auto-blow patent. Later, additional testimony and written evidence were offered with regard to the merits of the controversy (R. 5109–18).

J. REMEDIES AFFECTING PATENT RIGHTS WERE PROPERLY EXTENDED TO APPELLANTS BALL AND THATCHER, AND TO THE INDIVIDUAL APPELLANTS

Ball, Thatcher, and some of the individual appellants contend that they should not be included within the remedies affecting patent rights because they did not contribute any patents to the pool. Despite the fact that Ball did not actually license its patents to the other conspirators, it did agree not to convey its feeders or feeder patents to others without first offering them to Hartford (U. F. 385, R. 7358). Ball also, at least on one occasion, offered to let Hartford use its patents for the purpose of instituting litigation (Ex. 220, R. 12744).

Although the question of whether the ribbon machine was in the case was fully discussed in the court below, Corning did not there contend that the statement of appellees' counsel took the ribbon machine out of the case (Fol. 13290; Fol. 12520; Stip., R. 16531). Certainly, the statement of appellee's counsel cannot be construed as a waiver of substantial rights, where, as here, there is no showing of a clear intent on behalf of appellee to waive such rights. *Moore* v. *Atlantic Coast Line R. Co.*, 137 S. C. 319, 335–6 (1926). See also, *Stevens* v. *Guade*, 9 La. App. 664 (1920); *Reynolds* v. *McMan Oil & Gas Co.*, 11 S. W. (2d) 778 (Tex. Com. 1928); *Bankers Life Insurance Co.* v. *Ohrt*, 131 Nebr. 858 (1936); *Noska* v. *Mills*, 141 S. W. (2d) 429 (Tex. Civ. App. (1940)); cf. *Marconi Wireless Telegraph Co.* v. *United States*, 87 L. Ed. 1296, 1321. Furthermore, there was no reliance by Corning on the statement, since it thereafter offered proof on the issues relating to the ribbon machine and the proof was admitted. *Robert R. Sizer & Co.* v. *Chiarello Bros.*, 32 F. (2d) 333 (E. D. N. Y.).

Thatcher at least twice agreed to transfer to Hartford all improvement patents it might obtain relating to machinery licensed from Hartford (Ex. 240, R. 8938; Ex. 248, R. 8961).

Each of the corporate and individual appellants, moreover, is liable as a party to the general conspiracy (see p. 293, *supra*), which included as its core the control of the machinery and glassware industries through the Hartford licensing system and patent pool. As co-conspirators, Ball and Thatcher benefited perhaps as much as any of the others. It was through Hartford's *patent* position that Ball achieved monopolistic power in the fruit jar industry; and it was again the Hartford *patents* which gave Hartford the power to centralize the milk bottle industry in the hands of Owens and Thatcher (Ex. 246, R. 12770).

Having participated in the general conspiracy, there is every likelihood that unless prevented from engaging in the forbidden practices with respect to patents, Ball, Thatcher,[27] and the individuals will resort to the illegal use of patents to control competition in unpatented products. As

[27] Thatcher owned no patents at the time of the judgment (Thatcher Br. 8). The royalty-free compulsory licensing provisions can, therefore, have no application to it, and the only effect of including Thatcher in paragraph 24 is to subject it to the injunctions of subdivisions (b) and (c) with respect to compulsory licensing of future-acquired patents, and the furnishing of drawings and patterns. Its involvement in the conspiracy, however, presents ample threat of misuse of any patent rights which it might acquire in the future to require the application to it of these provisions.

co-conspirators, they are shown to have had that propensity and are therefore properly included in the patent provisions of the decree.

The individual appellants associated with the corporate appellants which contributed patents to the pool, moreover, are the human agents through whom the illegal pooling was accomplished and should be included in the terms of the decree, even as to individually-owned patents. In no other way can the public be protected against the dangerous probability that they will attempt to do as individuals what they have been enjoined from doing through corporate entities. Their use of the patents of the companies with which they are associated presents the further dangerous probability that they will make similar use of any patents which they may individually own. If instances of special hardship should arise, they can be taken care of by petition for modification of the judgment under Par. 57 (A) (R. 7691).

K. THE JUDGMENT WAS APPROPRIATE TO REMEDY THE ILLEGAL PRACTICES OF THE OTHER APPELLANTS THROUGH THE ASSOCIATION

In view of the employment of the Association as a tool by the conspirators in furtherance of the conspiracy, the appellee requested its dissolution (Ex. H–6113, R. 16271). *United States* v. *Nome Retail Grocery Men's Assn.*, 1 *Decrees and Judgments in Federal Antitrust Cases,* 86 (D. Alas.); *United States* v. *Trans-Missouri Freight Assn., Id.* 7 (D. Kans.) (on mandate from the Supreme

Court, 166 U. S. 290). While denying this request, the court abolished the statistical committee and directed the Association to have its certificate of incorporation and by-laws amended accordingly (Jdgt., par. 37, R. 7678). It enjoined the Association from continuing representatives of the other appellants among its officers and directors (*id.*, par. 38, R. 7679), forbade election or employment of such representatives to such positions in the future, and required the amendment of the certificate of incorporation and by-laws to provide that no person might hold office or employment in the Association who was at the same time an officer, director, or employee of the other corporate appellants (*id.*, par. 39, R. 7679).

Having held that the statistical committee appeared "to have been a breeding ground for hatching many of the conspiracies that were involved in the general conspiracy" (Op., R. 92), the district court appropriately provided for the permanent dissolution of this committee.[28] Similar relief

[28] The Association asks (Br. 48) how it can continue as a "statistical body" without some committee to deal with statistics. It was not the dealing with statistics which chiefly characterized the activities of the statistical committee and called for its abolition; but its efforts "to dictate to the industry" (cf. Op., R. 160). It is this which Par. 37 of the Judgment (R. 7678) forbids. In view of the district court's statement that the Association should continue "merely as a statistical and research body" (Op. R. 160), it is probable that a committee whose duties were strictly limited to general statistics and research would not be construed to be carrying on activities "similar to or identical with those of" the present statistical committee.

was granted in *United States* v. *Chicago Butter & Egg Board,* 1 *Decrees and Judgments in Federal Antitrust Cases,* 259 (N. D. Ill.). By prohibiting the election or the employment of representatives of the other appellants as officers, directors, or employees of the Association, the court took the best means, short of its dissolution, of assuring that it would not in the future be made a channel for illegal conspiracies. Cf. *United States* v. *Columbia Gas & Electric Corp.,* 36 F. Supp. 488, 495 (D. Del.), in which a corporation was enjoined from electing as directors any persons who were objectionable to the Department of Justice. The effectuation of these remedies through modification of the certificate of incorporation and by-laws was proper. *United States* v. *American Tobacco Co.,* 1 *Decrees and Judgments in Federal Antitrust Cases,* 157; *United States* v. *New England Fish Exchange,* 258 Fed. 732, 752 (D. Mass.); *Continental Insurance Co.* v. *United States,* 259 U. S. 156, 175.

In paragraph 40 of the judgment (R. 7680), all of the appellants [29] were enjoined from combining or conspiring (a) to limit production or fix prices or "to coerce, intentionally persuade, cause, impel,

[29] The fact that Corning was not a member of the Association presents no reason for excluding it from the operation of this provision. Corning lent its full weight to the campaign to stabilize the industry. (See pp. 29, 53–4, *supra.*) To be of any value, the injunction must proscribe the methods of stabilization as well as the specific acts by which it has been manifested. Cf. *Hershey Chocolate Corp.* v. *Federal Trade Comm'n,* 121 F. (2d) 968, 971–2 (C. C. A. 3).

advise, or induce" such limitation or fixing; (b) to ascertain the volume of business or make forecasts of estimated demands "where the purpose or effect thereof is to coerce or intentionally persuade" any manufacturer to control production or fix prices; (c) to collect, analyze, or distribute production, sales, costs, or price data where there is any disclosure of data concerning any particular manufacturer or where the purpose or effect is to coerce or intentionally persuade any manufacturer to control production or fix priees;[30] (d) to distribute statistics which are not made available to the general public;[31] (e) to examine the records of manufacturers other than in connection with the collection of royalties or Association dues; and (f) to allocate or refrain from soliciting customers or to allocate markets. Appellants were further enjoined from participating in any plan for the prorating of business or distributing data concerning the production, sales, costs, or prices of any manufacturer or presenting or discussing such data at meetings or elsewhere in such form as to

[30] The Association complains (Br. 52) that this provision is too broad because it would prohibit the Association from making a survey or analysis of the business of a single manufacturer or from imparting the results thereof to that manufacturer alone. A fair reading of the words "where there is any disclosure of data concerning any particular manufacturer or where the purpose or effect is to coerce or intentionally persuade any manufacturer" makes it clear that the disclosure referred to is a disclosure to third parties which might have a coercive or persuasive effect.

[31] The Association complains (Br. 53) that this provision would require it to reveal to the members of competing in-

indicate that any manufacturer has failed to conform to any quota or price.

These injunctions have correctly applied to the appellants the law relating to illegal trade association practices. As said by Chief Justice Hughes in the *Sugar Institute* case, 297 U. S., at 599–600:

> And while the collection and dissemination of trade statistics are in themselves permissible and may be a useful adjunct of fair commerce, a combination to gather and supply information as a part of a plan to impose unwarrantable restrictions, as, for example, to curtail production and raise prices, has been condemned. *American Column Co.* v. *United States,* 257 U. S. 377, 411, 412; *United States* v. *Linseed Oil Co., supra; Maple Flooring Assn.* v. *United States, supra,* pp. 584, 585.

It is *combination* to disseminate statistics which is enjoined by subparagraph 1 of paragraph 40 of the Judgment.[32] Dissemination without con-

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dustries "all that it does by way of research to improve its product and protect and enhance its business" and it "could not lawfully distribute credit information without making it fairly available to the general public." This, however, is a misinterpretation of the injunction, which is limited to "statistics or statistical compilations," and furthermore, when reasonably interpreted, applies only to the type of industry statistics which the Association has employed in support of its quota system.

[32] The effect of the phrase "where the purpose or effect thereof is to * * * intentionally persuade any manufacturer" to adopt such practices is merely to describe the illegal purpose or intent which must underlie the combination or conspiracy and serves to bring the proscribed activities more clearly within the rule of the cases forbidding combinations for those purposes.

certed action is enjoined under subparagraph 3 of Par. 40, only when effectuated in such manner as to indicate that any manufacturer has exceeded any production quota or failed to adhere or failed to conform to any price. Both limitation of production and price fixing are illegal *per se* (*supra*, p. 249) and necessarily involve concerted action.

It cannot be successfully contended that combinations or conspiracies to do any of the things enjoined by paragraph 40 (1) are legal which have "the effect," without the intent, of coercing any manufacturer into the adoption of such practices, since the absence of an intent to restrain trade, and even the presence of good motives, will not legalize a combination which effects an unreasonable restraint of trade. *United States* v. *American Linseed Oil Co.*, 262 U. S. 371, 390; *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49. *Maple Flooring Assn.* v. *United States*, 268 U. S. 563, was decided upon the assumption (p. 572) that the dissemination of trade information was unlawful if it necessarily resulted in fixing prices.

The injunction against combinations to disseminate trade data when there is any disclosure of data concerning any particular manufacturer falls squarely within the condemnation of the *Linseed Oil* and *American Column* cases and of *Fashion Guild* v. *Federal Trade Commission*, 312 U. S. 457. It is true that in the *Sugar Institute* case

the Institute was permitted to relay price announcements made voluntarily by individual refiners. This, however, was under the peculiar custom existing in the sugar industry to announce price changes for a considerable period in advance of their effective date. Under those circumstances the unreasonable restraint did not lie in the announcements themselves, but in the steps taken to require adherence to them (297 U. S. 601). Plans to enforce adherence were enjoined in that case. The disclosure of individual data in the instant case can serve no purpose other than to act as a sanction to enforce a plan to limit production or maintain prices. Cf. the *Linseed Oil, American Column,* and *Fashion Guild* cases. Hence, it falls within the prohibitions rather than the exception of the *Sugar Institute* case.

Hartford complains (Br. 172) that the judgment fails to except from the injunctions relating to price and other competitive activities the cooperative action authorized by the Emergency Price Control Act (50 U. S. C. App. § 905); Small Business Mobilization Act (*id.* § 1112); Miller-Tydings Act (15 U. S. C. § 1);[23] and Webb-Pomerene Act (*id.* § 62). Appellants have made no showing that they have ever availed themselves of any benefits under these acts, nor have they

[23] Hartford correctly notes that a specific exception is made as to Par. 40 with respect to Miller-Tydings Act activities by the corporate defendants (R. 7682).

demonstrated how the judgment prevents them from taking advantage thereof. Should they desire to take steps under these acts which they fear are prohibited by the judgment, they are, of course, free to apply to the court for such modification as may be necessary to enable them to take advantage of the acts. It seems wiser that they should be required to do this rather than that specific exceptions be inserted in the judgment. Exceptions might be used to purge appellants of contempt for violations of the judgment resulting from activities beyond the scope of those acts, on the basis of claims by the appellants that they believed such activities were protected by the acts.

L. INJUNCTIONS AGAINST INTERLOCKING DIRECTORATES, SECURITY HOLDINGS AND THE ACQUISITION OF COMPETING CONCERNS WERE PROPER

The individual appellants have been enjoined from holding securities of more than one manufacturer of glassware or glassware-making machinery (Jdgt. 33, R. 7674), and from holding offices or directorships in more than one of such concerns (*id.* Par. 35, R. 7676). The manufacturing corporate appellants and associated individual appellants have been enjoined from acquiring the assets or securities of other appellants (*id.* Par. 36 (A), R. 7677), and, while engaged in manufacturing glassware or glassware-making machinery, from acquiring the assets or

securities of any other concern so engaged (*id.* Par. 36 (B), R. 7678).[34] These provisions are all reasonably adapted to prevent future violations of the antitrust laws which are threatened in view of the past history of the conspirators.

In *United States* v. *American Tobacco Co.*, 1 *Decrees and Judgments in Federal Antitrust Cases*, 165, 189, and in *United States* v. *E. I. du Pont de Nemours, id.* 195, 204, the several concerns into which each of the monopolies was divided were enjoined from having common officers or directors for a period of five years and the individual defendants were forbidden to increase their stockholdings in the new or old concerns for a period of three years, unless they purchased from one another.[35]

It is significant, in connection with this relief, that the individual appellants associated with Corning effectuated the affiliation of that company with its machine development company, Empire, through common stock ownership, and

[34] Hartford complains (Br. 171) that these provisions would prevent a company from taking a note for goods sold and delivered to another company. This is contrary to the intent of the language as shown by the context. It is obviously meant to apply only to securities.

[35] The *du Pont* decree permitted an individual to increase his interest in any one of the concerns after all his holdings in the others had been disposed of. In *United States* v. *Union Pacific R. Co.*, 1 *Decrees and Judgments in Federal Antitrust Cases* 208, 215, the Southern Pacific and its subsidiaries were enjoined from having any common officer or director with the Union Pacific or its subsidiaries.

that Corning's influence in Hartford's affairs resulted not only from stock ownership in Hartford, through Empire, by individuals associated with Corning but also from the presence of at least four of such individuals on the Hartford board of directors. Corning had protected itself from potential competition by Hartford in the manufacture of glassware by the provision in Hartford's certificate of incorporation requiring the approval of 65% of the common stock or unanimous approval by the board of directors to permit Hartford to manufacture glassware. It is to prevent such practices that the above injunctions are necessary.[36] Par. 50 of the Judgment (R. 7686), requiring Hartford to strike the last mentioned provisions from its certificate of incorporation, is necessary to complete the divorcement of Hartford from the Corning interests.[37]

[36] Corning complains (Br. 64–5) that the requirements of Par. 33 of the Judgment (R. 7674) that appellants Amory and A. A. Houghton, Jr., and A. D. Falck shall dispose of either their Hartford or Corning stock within two years of the judgment is unjustifiable and that these individuals should in no event be required to dispose of the stock for at least five years. It should be noted in this connection that this provision of the judgment has not yet become effective and will not become effective until two years after the mandate of this Court, or more than three years after the judgment, and almost six years after the complaint was filed. It might be thought that the filing of the complaint should have been ample notice to these appellants to extricate themselves from their dual position with Hartford and Corning.

[37] As to the legality of requiring a corporation to amend its by-laws, see cases cited *supra*, p. 394.

555800—43——27

Provisions against stockholdings in competing companies or in component parts of a combination to be dissolved are familiar in antitrust decrees. *Continental Insurance Co.* v. *United States,* 259 U. S. 156, 175; *United States* v. *Union Pacific R. Co.,* 226 U. S. 470, 475–6. Cf. *Northern Securities Co.* v. *United States,* 193 U. S. 197, 355; *United States* v. *Union Pacific R. Co.,* 226 U. S. 61, 96–7; *Standard Oil Co.* v. *United States,* 221 U. S. 1, 79.

M. BALL AND LYNCH ARE PROPERLY REQUIRED TO SELL THE ASSETS OF COMPETING CONCERNS WHICH THEY ACQUIRED

Under Par. 43 of the judgment (R. 7683), Ball is required to offer to sell the Three Rivers plant at a fair price to be determined by the court; and by Par. 49 (R. 7685) Lynch is required, two years after the war, similarly to offer for sale the assets which it acquired from Ed Miller. Three Rivers had been in competition with Ball, selling fruit jars at lower prices than those of Ball (U. F. 389, R. 7359), and the district court concluded that the acquisition was illegally in restraint of trade and in furtherance of a plan to obtain a fruit jar monopoly (Concl. 78, R. 7417).[88] Similarly, the district court concluded

[88] Ball argues (Br. 69) "that when viewed as an independent act by a company not a party to the conspiracy alleged by the complaint" the Three Rivers acquisition "has no significance whatever." This, of course, is an entirely unrealistic approach to the problem, since it is abundantly established not only that Ball was party to the conspiracy in general (*supra*, pp. 146–57, 288–92) but also that it acquired Three Rivers in cooperation with Hartford (*supra*, p. 157).

that Lynch's acquisition of Ed Miller, with the assistance of Owens and Hartford, was illegal and in pursuance of a plan to corner the forming machine market (Concl. 64, R. 7415).[39] The divorcement provisions of the decree are therefore appropriate. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 1 *Decrees and Judgments in Federal Antitrust Cases* 136; *United States* v. *American Tobacco Co.,* 226 U. S. 106, 1 *Decrees and Judgments in Federal Antitrust Cases* 165; *United States* v. *Pullman Co.,* 50 F. Supp 123 (E. D. Pa.).[40]

N. THE PROVISIONS WITH RESPECT TO INSPECTION BY THE DEPARTMENT OF JUSTICE OF THE RECORDS OF THE CORPORATE APPELLANTS WERE PROPER

Appellants contend that the provisions of Par. 55 of the judgment (R. 7690), requiring defendants to submit to reasonable inspection and to

[39] Lynch contends that the reception of evidence as to the acquisition of the entire business of the Ed Miller Company was a variance from the allegations of the complaint, which referred only to the purchase of patent rights. Lynch made no objection to the admission of this evidence upon this ground at the time it was offered. (E. g., R. 1152; R. 1171; R. 2699; R. 2742; et seq.) For discussion of the law and authorities showing the fallacy of Lynch's contention see pp. 307–8, *supra.*

[40] Similar decrees, though unreported, were entered in the following cases: *United States* v. *International Harvester Co.* (D. Minn.), Nov. 2, 1918; *United States* v. *Corn Products Refining Co.* (S. D. N. Y.), Mar. 31, 1919; *United States* v. *Eastman Kodak Co.* (S. D. N. Y.), Feb. 1, 1921; *United States* v. *Cement Securities Co.* (D. Col.), Dec. 13, 1924; *United States* v. *Crescent Amusement Co.* (M. D. Tenn.), Mar. 3, 1943.

render reports at the request of the Department of Justice, for the sole purpose of securing compliance with the judgment, constitute "perpetual espionage," citing a case involving the Fourth Amendment to the Constitution, which forbids unreasonable searches and seizures. A statute making similar requirements was held not to violate either the Fourth or Fifth Amendment in *Baltimore and Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612, 622. Obviously the district court could not have enforced its decree without the ability to check on what the appellants were doing, and it could have employed its own agents for that purpose (if appropriations were available). In fact, the district court has no staff to perform such a function unless it can make use of the personnel of the Department of Justice. It is therefore essential, particularly in a judgment as complex as the present one, that the court should have the assistance of the Department in checking from time to time upon the effectiveness of the operation of the judgment and the degree of compliance being given thereto. There is no more appropriate method of doing this than by requiring appellants to permit periodical inquiries by the department of the Government which is charged with the duty of enforcing the antitrust laws.

Hartford (Br. 165) complains that the decree will make the district court act as a super com-

mission. But it is not at all unusual for the district court, after finding that the defendants have violated the Sherman Act, to provide that the subsequent activities of the defendants shall be subjected to the close supervision of the court. E. g. *United States* v. *Terminal Association of St. Louis*, 1 *Decrees and Judgments in Federal Antitrust Cases*, 96, 98 et seq.; *United States* v. *American Tobacco Co.*, 1 *Decrees and Judgments in Federal Antitrust Cases*, 165, 190; *United States* v. *Union Pacific Railroad Co.*, 1 *Decrees and Judgments in Federal Antitrust Cases*, 217–29. In the latter case the court expressly appointed an individual as "commissioner for the court to see to it that the letter and spirit of this plan of dissolution is carried out and is directed to report to the court from time to time" (p. 229). Cf. *United States* v. *Lake Shore & Michigan Southern Railway Co.*, 1 *Decrees and Judgments in Federal Antitrust Cases*, 289, 307; *United States* v. *New Departure Mfg. Co.*, 1 *Decrees and Judgments in Federal Antitrust Cases*, 471, 475.

O. THE RECEIVERSHIP WAS PROPER AND NECESSARY

The district court appointed a receiver both in order to conduct the Hartford business during the pendency of the appeal and to see that Hartford fully conformed to the decree.

The power of the district court to appoint a receiver under the circumstances of the instant

case cannot be questioned. See *United States* v. *American Tobacco Co.*, 221 U. S. 106, 166; *United States* v. *Great Lakes Towing Co.*, 217 Fed. 656, 661 (N. D. Ohio), appeal dismissed, 245 U. S. 675, 1 *Decrees and Judgments in Federal Antitrust Cases*, 253. Cf. *United States* v. *International Harvester Co.*, 214 Fed. 987, 1001 (D. Minn.), appeal dismissed, 248 U. S. 587. Cf. *Securities and Exchange Commission* v. *Fiscal Fund*, 48 F. Supp. 712 (D. Del.). Furthermore, the appointment or removal of a receiver rests in the sound discretion of the trial court. *Milwaukee & Minnesota R. Co.* v. *Soutter*, 154 U. S. 540.

A stay of most of the provisions of the judgment was granted pending the appeal to this Court (R. 7745). The receivership was the only means of assuring the continuance of Hartford's lease-licensing business during the pendency of the appeal, as supplemental to the stay, and of preserving Hartford's assets until ultimate determination (a) as to the effectiveness of the judgment to neutralize the monopoly and (b) of the question as to the necessity for a dissolution of the company. In view of the judgment declaring the license agreements illegal and requiring Hartford, if it continues in interstate commerce, to issue licenses royalty-free, there was every likelihood that if no receiver had been appointed, the licensees, pending the appeal, would have ceased paying royalties and seriously impaired the future status

of the company in the event the judgment should be reversed.

The receivership was also plainly necessary to dispose of the earmarked funds discussed in the following subsection.

Paragraph 19 of the decree provides (R. 7665):

> Said Receiver shall continue to remain in control of defendant Hartford-Empire Company and all of its assets and other property until the Court is: (1) satisfied that violations of the Sherman Antitrust and Clayton Acts by defendant Hartford-Empire Company have ceased; (2) satisfied that its orders in this case have been carried out by defendant Hartford-Empire Company; and (3) satisfied that there no longer remains a reasonable probability that the practices found illegal by it will be resumed by defendant Hartford-Empire Company.[41]

This provision was an appropriate means of insuring Hartford's compliance with the decree.

[41] The remainder of this paragraph of the judgment reads as follows:

"If, at any time, the Receiver or the Attorney General concludes that the provisions of this decree are not operating to eliminate the practices of Hartford-Empire Company found by this Court to be illegal, the Receiver shall, upon application to the Court, and on notice to the Attorney General of the United States and to Hartford-Empire Company, or the Attorney General, on notice to Hartford-Empire Company and the Receiver, shall submit a plan or plans for the dissolution of Hartford-Empire Company."

Hartford complains (Br. 140) that the Receiver, with respect to the ordinary business affairs of the company and through the execution of contracts binding in the future, will be able to set the pattern of Hartford's business for many years to come. The receivership, of course, is not designed to be permanent. It is not to be presumed that it will take "many years" for the district court to determine that violations of the antitrust laws have ceased, that the court's orders have been carried out by Hartford, and that no reasonable probability remains that the practices found to be illegal will be resumed by Hartford. When this occurs, the receivership will cease.

P. THE DISTRIBUTION OF EARMARKED AND IMPOUNDED FUNDS

1. *Earmarked funds*

The judgment below nullified Hartford's system of licenses. Upon its entry the licensees might well have refused to pay royalties either to Hartford or the Receiver. In order to protect Hartford during the pendency of the appeal, the judgment provided that the payments from each licensee were to be earmarked and returned to the licensee if no appeal were taken or if the district court's judgment were affirmed by this Court (Par. 15, R. 7663). The provision was fair both to the licensees and to Hartford, and was obviously a proper exercise of the court's discretion.

Contrary to the claim by Hartford (Br. 139), the Receiver is not dissipating the capital assets of Hartford pending the appeal. Paragraph 15 of the judgment (R. 7663) specifically provides that the Receiver may deduct from royalties which have been paid him by the licensees and which are to be returned by the Receiver after the judgment below is affirmed,

> any amounts paid out by the Receiver for the benefit of any such licensee and properly chargeable and allocable to any such licensee.

Hartford, of course, should be compensated for its servicing of the machines in the hands of the licensees, and perhaps should be paid for the use of its machines (but not its patents) until title to such machines passes to the licensees in accordance with the terms of the judgment. Such payment, however, should not, as suggested by Hartford (Br. 147), be the total amount of the royalties. Such royalties aggregate about $6,000,000 annually (R. 945), whereas, the estimated annual deficit between expenditures and receipts (excluding the earmarked royalties) is $1,200,000 (Hartford Br. 149).

2. *The impounding order for funds due under the Hartford-Hazel agreement*

The district court, on May 9, 1941, granted a motion of the appellee to impound all payments under the Hartford-Hazel 1932 General License

Agreement (R. 519). It had found, as a basis for the order, that that agreement was *prima facie* illegal and that Hazel was enjoying under it an unfair competitive advantage over other Hartford licensees in whose royalties it was sharing. The court believed that such royalties, as funds of Hartford, might be needed to finance any dissolution of Hartford which might ultimately be decreed, especially in view of the likelihood of a dissipation of assets by Hartford pending the determination of the suit. See court's oral opinion (R. 2685–7), findings of fact (R. 514–8) and conclusions of law (R. 518). As a "temporary restraining order or prohibition" before final judgment, this was a proper exercise of the court's authority under Section 4 of the Sherman Act (26 Stat. 209–10, 15 U. S. C. A., § 4).[42] See *United States* v. *Coal Dealers Assn.*, 85 Fed. 252 (C. C. N. D. Cal.); *United States* v. *Schine Chain Theatres, Inc.*, 31 F. Supp. 270, 272 (W. D. N. Y.). On general equity principles, the propriety of the order is clear.[43]

[42] The pertinent provisions of this section are:

"* * * pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

[43] In *United States* v. *American Tobacco Co.*, 221 U. S. 106, this Court said (p. 188) that pending dissolution of the monopoly and re-creation of a situation in harmony with the antitrust laws, the defendants—

"should be restrained from doing any act which might fur-

The funds so impounded were to be held until further order of the court. The court did not, of course, intend that they be retained permanently. If the appellants should prevail in this appeal, no further step would remain but for the court to distribute the funds to their lawful owners. If the judgment below is affirmed, the 1932 agreement will be canceled, and payments under the impounding order will cease. The funds impounded should then be distributed in a manner most consistent with the purposes of the judgment. The problem of distributing the impounded funds, however, will not arise until the District Court has finally decided that dissolution is unnecessary. When that time comes, the court should distribute the impounded funds in accordance with equitable principles. See *United States* v. *Morgan*, 307 U. S. 183, 193–4.

We suggest that the following observations are pertinent as to the principles that the court should apply in this distribution: The 1932 contract gave Hazel an unlawful advantage over its competitors in that it required Hartford to turn over to Hazel one-third of all net income from licensed inventions in excess of $850,000.

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ther extend or enlarge the power of the combination, by any means or device whatsoever."

H. P. Hood and Sons, Inc. v. *United States*, 97 F. (2d) 677 (C. C. A. 1), affirmed, 307 U. S. 588; *American Smelting and Refining Co.* v. *Bunker Hill, etc., Co.*, 248 Fed. 172 (D. Ore.); *Joplin and P. Railway Co.* v. *Public Service Commission of Missouri*, 267 Fed. 584, 587 (W. D. Mo.); cf. *Venner* v. *Pennsylvania Steel Co.*, 233 Fed. 407 (C. C. A. 3).

The amount of the impounded fund contributed by Hartford consists of the amount collected during this period pursuant to this provision. It would not be consistent with the object of the judgment if this sum should be given to Hazel. In order to eliminate the unlawful discrimination in favor of Hazel, one of two courses should be followed: (1) the money could be returned to the receiver on behalf of Hartford, or (2) if it is practical to do so, the money could be distributed pro rata among the licensees from whom it was collected and who were injured by the conspiracy.

The portion of the fund contributed by Hazel comprises the royalties payable to Hartford under the Hartford license. Hazel should be put in the same position as the other licensees in this respect. The royalties should be turned over to Hartford for the period before the royalties paid by other licensees were earmarked to be returned if the judgment was affirmed. The royalties impounded during the period of earmarking should be returned to Hazel on the same terms as those on which the earmarked funds are returned to the other licensees. To the extent that Hazel has contributed services to Hartford, Hazel should be compensated from the funds impounded on a *quantum meruit* basis. The details of the plan suggested can of course be worked out by the district court.

3. *The payments from Hartford to Ball and Corning*

Under paragraph 44 of the judgment (R. 7683) Ball was directed to pay in to the impounded funds the $425,000 paid it by Hartford under the settlement agreement of August 1, 1940; and under paragraph 45 (A) of the judgment (R. 7683), Corning was directed to pay into the impounded fund moneys received from Hartford pursuant to the settlement agreements of September 23, 1940, and December 1, 1940.[*] These were necessary steps in the restoration of the *status quo* which had been disturbed by these agreements and are orders which could have been entered at the time of the payment without respect to the merits of the antitrust action. See *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 17–18.

When the time for the distribution of these funds arrives, it will be for the district court to determine whether Corning and Ball are entitled to be paid by Hartford for the relinquishment of their exclusive rights under illegal contracts. But apart from the considerations

[*] In order to restore the *status quo* as it existed prior to the execution of these contracts, the court in paragraph 45 (B) of the judgment (R. 7684), ordered Corning to retransfer to Hartford the three patents which Hartford had assigned to Corning thereunder. Two of these patents having subsequently expired, no action with respect to them is now necessary. The Smith reissue patent, however, has several years to run and should be retransferred or dedicated to the public, as suggested by Corning (Br. 63).

advanced above with respect to the necessity of preserving Hartford's assets in case dissolution becomes necessary, appellee has no interest in which of the wrongdoers obtains the money in question. As between the parties, we suggest, however, that the funds should go to Hartford, thereby restoring the status quo as of the time of the institution of the suit.

CONCLUSION

It is respectfully submitted that, with the minor modifications noted (*supra*, pp. 327–8), the judgment below should be affirmed.

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APPENDIX

TABLE OF CONTENTS

	Page
Section I. The thirty applicants to whom Hartford refused to lease its equipment or whom it discouraged from manufacturing glassware	416
Section II. The thirty-two instances of refusals to extend Hartford feeder licenses to include requested items of glassware	418
Section III. Exhibits 1169–70	421
Section IV. Computation of trade advantage realized by Owens under 1924 agreement	424
Section V. Joint conferences between Owens and Hartford on litigation and interferences	425
Section VI. Amounts paid by Hartford to outsiders for patent control	427
Section VII. Summary of the acts of those individual appellants, not heretofore discussed, as to whose individual liability an issue has been raised in appellants' briefs	430
Section VIII. Instances of participation by Owens in conspiracy subsequent to 1935 agreements	434
Section IX. Exhibits cited showing record page where admitted	437
Section X. Identity of individuals referred to in brief	447

SECTION I

THE THIRTY APPLICANTS TO WHOM HARTFORD REFUSED TO LEASE ITS EQUIPMENT OR WHOM IT DISCOURAGED FROM MANUFACTURING GLASSWARE (BR. 19)

Company	Ware types [1]	Exhibit numbers	Date of refusal or discouragement
Ross Wilson	Milk bottles	R [2] 434–5 (R. 13057–9; 1304–5)	March 22, 1935.
North Baltimore Glass Co	Pressure ware	R 439–42 (R. 13061–3; 1306–8). See also R. 1308	August 26, 1925.
St. Albans Glass Co	Milk bottles	D [2] 445–8 (R. 13066A–9; 1309	September 10, 1925.
Old Dominion Glass Co	Milk bottles	R 444 (R. 13065; 1306–8)	September 23, 1925.
Wormser Glass Co		R 449–60 (R. 13070A–8; 1310)	November 1925.
Fry Glass Co	Bulbs, ovenware	R 341 (R. 12913; 1187); 350 (R. 12920; 1191)	January 7, 1926 and May 19, 1926.
Swindell Bros., Inc. [4]		R R. 1246	April 22, 1926.
Three Rivers Glass Co. [4]		R 399 (R. 13008C; 1240). See also R. 1240	Before December 23, 1926.
Macbeth-Evans Glass Co. [4]	Tumblers and lantern globes	R 418 (R. 13037; 1280)	October 26, 1927.
Witherspoon-Simpson Glass Co	Milk bottles and fruit jars	R 463–4 (R. 13062–3; 1312)	October 17, 1930.
C. W. Crowell		R 466 (R. 13065; 1312)	April 6, 1930.
Chas. O. Kiefer [3]	Tumblers	R 469 (R. 13067; 1313)	June 10, 1931.
Glass Syndicate	Beverage and milk bottles	R 470–3 (R. 13068–91; 1313)	November 9, 1932.
L. R. Ludlum		R 474 (R. 13092; 1314)	December 15, 1932.
E. C. Devlin, Northern Glass Co	Beverage bottles	R 863 (R. 13527; 2235)	Before January 13, 1933.
C. I. Gause, Connelly Glass Co	Beer bottles	D 479 (R. 13097; 1315)	August 1, 1933.
A. F. Floan		D 997 (R. 13662; 2667); 998 (R. 13662A; 2669). See also R. 2670–1.	December 1933.
H. H. Howard		R 1820 (R. 14351; 4211)	November 21, 1934.
R. W. Moore		R 483 (R. 13100; 1317)	December 31, 1934.

F. M. Smith, Western Glass Products Co.	Beer and liquor bottles	R	484 (R. 13101; 1318)	January 11, 1935.
C. V. Wallis, Dallas Chamber of Commerce.	Packers ware, beverage bottles	D	489–94 (R. 13106A–10A; 1325)	July 16, 1935.
G. E. Day		R	R. 1634–40; 2261–2 497 (R. 13112A; 1328)	February 1936.
Guth-Pepsi-Cola Company	Beverage bottles	D	1292 (R. 13881; 3255)	June 15, 1936.
J. F. Holland, American Glass Co		R	1089–92 (R. 13728–9; 2818) 1098 (R. 13734; 2820); See R. 4235	May 25, 1937.
Sandy Valley Glass Co	Fruit jars	R	508 (R. 13118; 1336)	August 20, 1937.
Mantle Lamp Co. of America	Lamp chimneys and vacuum bottle pistons	R	506 (R. 13115; 1334) 507 (R. 13118; 1335)	September 23, 1937.
C. W. Crowell, Wharton Glass Co.[8]		D	1851 (R. 14379; 4250)	July 5, 1938.
W. S. Hubbard, Wabash Fibre Box Co	Whiskey bottles	R	511–17 (R. 13122–9; 1338)	December 21, 1938.
Hartley Group		D	1506 (R. 14001; 3737) 1507 (R. 14002; 3737)	April 17, 1939.
Nola Glass Co		R	H–5185 (R. 14866B; 3316) H–5186 (R. 14866D; 3342) 597 (R. 13210; 1505) 1300–2 (R. 13891–3; 3266)	December 27, 1940.

[1] If no ware type is listed, the request either did not specify the ware type desired, or included a general line of glass containers.

[2] R=Hartford refused to grant, or failed to answer, the request for a license.

[3] D=Discouraged.

[4] Subsequently, on July 28, 1927, Hartford granted Swindell a feeder license (Ex. H–5196, R. 9574; 3603; Ex. H–5750, p. 5, R. 15440; 5733).

[5] Invoking Section 22 of its contract with Hartford (Ex. 55, R. 8640, 810), Owens refused to permit it to license Three Rivers (R. 1240; Ex. 399, R. 13008C; 1240). Subsequently, in 1929, Hartford granted Three Rivers a feeder license (Ex. H–5750, p. 6, R. 15441; 5733).

[6] In declining to grant this license, F. G. Smith informed Macbeth "that neither Hocking nor Federal can see their way clear at this time to consider the question of dividing rights with you on tumblers and lantern globes" (Ex. 418, R. 13037; 1280). Subsequently, on June 29, 1929, Hartford granted Macbeth-Evans a feeder license (Ex. H–5012, R. 9517; 1457; Ex. H–5750, p. 5, R. 15440; 5733).

[7] F. G. Smith refused this request for a license for tumblers "primarily" because Hartford felt (Ex. 469, R. 13087; 1313) "it would not be to the best interests of our present licensees, such as Hocking," Federal and Macbeth-Evans.

[8] This request was not connected with the previous request by Mr. Crowell.

SECTION II

THE THIRTY-TWO INSTANCES OF REFUSALS TO EXTEND HARTFORD FEEDER LICENSES TO INCLUDE REQUESTED ITEMS OF GLASSWARE (BR. 33)

Licensee	Ware types refused	Exhibit numbers	Date of refusal
Corning Glass Works	Blown bottles generally [1]	396 (R. 13006; 1237)	May, 1924.
Hygeia Glass Corp	Undisclosed item [1]	397 (R. 13008A; 1237)	
Buck Glass Co	Various items other than milk bottles [2]	R. 1281	May 25, 1925.
		419 (R. 13037; 1286); see R. 1281	May 25, 1925 to March 17, 1930.
Winslow Glass Co	Malted Milks [1]	401 (R. 13010B; 1242), H-5750 (R. 15440; 5733)	January 21, 1927.
Buck Glass Co	Removal of numerical limitation on milk bottles	422 (R. 13041; 1292)	April 24, 1928 to December 2, 1932
		423 (R. 13044; 1293)	
		424 (R. 13045; 3392)	
		425–8 (R. 13047–50; 1293–5)	
		1249–50 (R. 13830–1; 3084)	
		1340 (R. 13017; 3392)	
		2000 (R. 14625; 6720)	
Macbeth-Evans Glass Co	Custard Cups [3]	354 (R. 12922; 1193), H-5750 (R. 15440–1; 5733)	October 26, 1929.
Three Rivers Glass Co	Milk bottles	1249 (R. 13831; 3084)	December 23, 1929.
Buck Glass Co	Special items of prescription and proprietary ware, and mushroom spawn bottles.[4]	408 (R. 13021; 1246; 573), H-5750 (R. 15441; 5733)	November 11, 1930
Corning Glass Works	Containers	392 (R. 12994; 1230); Corning Ans. Par. 46 (R. 329); H-E Ans. Par. 46 (R. 384).	1930-31.
Hocking Glass Co	Opal ware [1]	645 (R. 13308; 1605), H-5750 (R. 15441; 5733)	December 6, 1930.

McKee Glass Works	Heat resistant ware [1]	355–8 (R. 12923–4; 1194) 361–2 (R. 12929–30; 1195) 1355–6 (R. 13928–9; 3431) 1752 (R. 14235; 4039) 1753 (R. 14238; 4041)	1931–35.
Macbeth-Evans Glass Co	Heat resistant ware, bulbs of special type [1]	358 (R. 12924; 1194) 361 (R. 12929; 1195) 1546–7 (R. 14048–50; 3806) 1807 (R. 14324; 4201), H–5750 (R. 15441–2; 5733)	1931–2.
Knox Glass Bottle Co	Fruit jars, unrestricted number of milk bottles, carbonated beverage bottles,[4] and tumblers.	151 (R. 8835; 928); R. 1529–1531	August 25, 1932.
Lamb Glass Co	Various items other than milk bottles	1354 (R. 13928; 3429) 152 (R. 8853; 930)	November 10, 1932.
Brockway Glass Co	Milks and fruit jars	R. 3156–9; R. 3162–3; R. 3165–6	November 11, 1932.
Universal Glass Products Co	Beer bottles	1363 (R. 13935; 3437)	March 31, 1933.
Receiver, Three Rivers Glass Co	Milk bottles	482 (R. 13099; 1317)	April 29, 1933.
Maywood Glass Co	Round gallon jugs [7]	823 (R. 13488; 2115); H–5750 (R. 15444; 5733)	October 14, 1933.
Universal Glass Products Co	Increase in amount of numerical limitation on milk bottles.	1818 (R. 14349; 4211)	March 2, 1934.
Fairmount Glass Works	Pyrex insulin bottles, etc.[3]	363 (R. 12932; 1196)	April 30, 1934.
Knape-Coleman Glass Co	Milk bottles	738 (R. 13433; 1838)	October 24, 1935.
Diamond Glass Co	Perfume bottles	H–5446 (R. 15198; 4992)	November 4, 1936.
Hocking Glass Co	Heat resistant ware [3]	369–71 (R. 12936–7; 1200–1) 372–4 (R. 12939–40; 1201–2)	1937.
Indiana Glass Co	Heat resistant ware [3]	365–8 (R. 12933–6; 1198)	February 1937.
Owens-Illinois Glass Co	Heat resistant insulators [3]	376–8 (R. 12943–6; 1206–7)	February 1938.
Gayner Glass Works	Narrow mouth food containers, jugs (any size, any purpose), wide mouth food containers (any size, unlimited quantity), wine, beer, liquor, and beverage bottles, prescription ware.	1208–9 (R. 13808; 3269–70); H–5750 (R. 15448–9; 5733)	September 16, 1938.

See footnotes at end of table.

THE THIRTY-TWO INSTANCES OF REFUSALS TO EXTEND HARTFORD FEEDER LICENSES TO INCLUDE REQUESTED ITEMS OF GLASSWARE (BR. 33)—Continued

Licensee	Ware types refused	Exhibit numbers	Date of refusal
Sterling Glass Div. of The Warfield Co.	Fruit jars and various other items	520-5 (R. 13134-9; 1343)	July 19, 1938, to February 26, 1940.
Swindell Bros., Inc.	Signal buttons	1310 (R. 13000A; 3270)	February 20, 1939.
Armstrong Cork Co.	Sherbet glasses [1]	1308 (R. 13045; 3454)	May 18, 1939.
Northwestern Glass Co.	Prescription ware	1313-14 (R. 13000D-01; 3274)	July 5, 1939.
Bartlett-Collins Co.	Heat resistant ware	1219 (R. 13005; 3277)	November 3, 1939.
T. C. Wheaton Co.	Heat resistant ware [2]	1551 (R. 14054A; 3807); R. 6725	After June 28, 1938.

[1] Invoking Section 22 of its contract with Hartford (Ex. 55, R. 8640; 810), Owens refused its consent to extend the license to this type of ware.

[2] On March 7, 1930, Pease wrote to Carter (Ex. 419, R. 13038; 1286): "On a number of occasions the Buck Company has wanted us to add items to its field, but we have thus far held them to their present license."

[3] Insisting upon its exclusive license from Hartford for this kind of ware, Corning refused to permit Hartford to grant this request.

[4] The requests were granted over two years later, on January 30, 1933 (Ex. H-5750—p. 7, R. 15442; 5733).

[5] Although Corning offered Macbeth-Evans a sublicense for heat-resistant ware, it was subject to the condition that Macbeth-Evans would not manufacture bulbs (Ex. 1546, R. 14048; 3806). Macbeth thought this restriction and others too burdensome to enable it to accept the license (Ex. 1547, R. 14050; 3806).

[6] Not until January 16, 1940—over a month after the filing of the complaint in this case—did Hartford grant Knox a feeder license for this type of ware (Ex. H-5750—p. 14, R. 15449; 5733).

[7] Not until January 9, 1937, did Hartford grant Maywood a license to manufacture *round* gallon and half-gallon jugs, and then the license was limited to 200 and 1,500 gross annually, respectively (Ex. H-5750, p. 12, R. 15447; 5733). On August 7, 1940—after the institution of this suit—restrictions on the quantity of Maywood's jug production were removed (*id.*—p. 15, R. 15450; 5733).

[8] Hartford did permit Armstrong Cork to make this item of ware but to fill one specific order only, refusing to permit it to fill subsequent orders even if made only for the same customer (Ex. 1368, R. 13945; 3454).

SECTION III

EXHIBITS 1169–70 (BR. 32)

ANCHOR–CAPSTAN–SALEM
INTER-OFFICE CORRESPONDENCE

MAY 20 1938
ANCHOR HOCKING
GLASS CORP.

Date *May 18, 1938.*
Dept.

From: *Houston Office* Dept. *Container—*
To: *Lancaster* *Mr. W. V. Fisher.*
Subject: *Thin blown tumblers for packers.*
Yours of

During the convention something was mentioned about Corning Glass Works having developed a method whereby they are able to blow out a ribbon of glass and form this into tumblers without having to drop the individual daubs of glass into molds.

You, no doubt, already have complete information on the above, but nevertheless, I am calling it to your attention, because it does seem possible that such a method would work by having a series of molds lined up directly under the ribbon and by using a shallow plunger to partly shape the bubble of glass downward into the molds and afterwards use vacuum at the bottom and air pressure at the top to complete the package. Such an

operation would, no doubt, leave a fin at the top of the tumbler, but it may be that this could be pressed so thin that it would break off automatically when the tumblers were lifted from the molds. If such an operation is practical, it might eliminate the necessity of trimming off the top of the tumblers, and it would probably hold a more uniform finish and it would speed up the manufacturing operation, and it might reduce the amount of time required in selecting thin blown tumblers used for packers purposes.

In writing to you, I will admit that I know very little about how thin blown tumblers should be made—in fact, the only knowledge that I have is that gained at the factory last week, so please don't construe this letter to mean that I am trying to tell you how to make thin blown tumblers, since all I intend to do is to bring a thought to your attention. If it is any good, I know that you will give it further thought, if no, you will simply throw it in the waste basket, which will be entirely all right.

The time spent with you last week was certainly enjoyed, and we will endeavor in every way to help you do the things that you have in mind for the future. *Right Now.*

Very truly yours,

(Signed) JOHN NOLAN.

JRN:J

May 26, 1938
(Dict. May 24)

MR. JOHN NOLAN,
1002 Washington Avenue,
Houston, Texas.

DEAR JONNIE: This will acknowledge yours of the 18th and I want to thank you for your suggestion contained therein.

Yes, I am familiar with the Corning process, having watched it develop from the time it was first used to make bulbs thru until the present where Corning is making a tumbler. We, however, cannot avail ourselves of this process because it is covered with airtight patents and Corning is going to use it for tumbler production themselves. A year ago it looked like we were going to get the rights on this, but Corning changed their mind in the middle of the stream.

I certainly enjoyed having you here during the Convention time, and as we learn to know your problem a little better, hope that we will be able to do something real for you down in Houston in the way of Glass. I just want you to know that our heart is right on this, and I wish we could do it "RIGHT NOW" for you.

Yours very truly,

ANCHOR HOCKING GLASS CORPORATION.

V. P. & Gen. Mgr.

WVF/NAK

SECTION IV

COMPUTATION OF TRADE ADVANTAGE REALIZED BY OWENS UNDER 1924 AGREEMENT (BR. 59)

Year	(1) Royalties received from Hartford (Ex. 782, R. 7930G)	(2) Royalties received from T. R. & B. feeders (Ex. 782, R. 7930G)	Number of free feeders (R. 6753–4)	(3) Maximum value of free feeders used [1]	(4) Infringement damages for Hazel operations prior to 7–1–32 (Ex. 1155, R. 13773)[2]	Total trade advantage	Owens' net income (Ex. 1596, R. 8194)
1924	$22,830.39		0			$22,830.39	Not in record
1925	125,379.09		18	$198,000		323,379.09	Not in record
1926	215,915.43	$111,901.50	24	264,000		591,816.93	Not in record
1927	263,703.06	128,540.16	22	242,000		634,243.22	Not in record
1928	284,808.55	129,779.54	19	209,000		623,588.09	$4,529,919
1929	391,850.91	122,904.23	16	176,000		700,755.14	5,280,273
1930	385,001.38	139,266.71	16	176,000		700,868.09	2,934,545
1931	391,235.80	125,580.44	16	176,000		692,816.24	3,114,581
1932	[3] 289,208.10	54,319.27	8	[4] 44,000	$500,000	987,527.37	2,247,802

[1] The 1924 agreement established the maximum value of forty royalty-free feeders at $440,000 per year, or $11,000 per feeder (Ex. 55, § 5, R. 8635).

One reason given by Carter for Owens' failure to use all the free units was (Ex. 141, R. 12666–7): " * * * the greater part of our feeder production has been had at factories taken over from Illinois Glass Company, Berney-Bond Company, and Illinois Pacific Coast Glass Company, whose operations were carried on under license contracts from Hartford which were assumed as continuing obligations when this corporation took them over."

[2] Owens also received its share of infringement damages paid for use of allegedly infringing equipment prior to July 1, 1932, by others than Hazel, but since this data is not collected in the record, or apportionment made of those sums applicable for alleged infringing operations prior to July 1, 1932, no sum other than that received by Owens for Hazel-Atlas, is included.

[3] Includes one-third, rather than one-half, of Hartford's divisible income, subsequent to July 1.

[4] Owens' use of free feeders ceased as of July 1, 1932 (Ex. 141, R. 12666).

SECTION V

JOINT CONFERENCES BETWEEN OWENS AND HARTFORD ON LITIGATION AND INTERFERENCES (BR. 61)

No.	Exhibit	Date	Conference	Present
1	618 (R. 13245) 1527(R.14026A) H-5423 (R. 15162). 619 (R. 13249). 1873 (R. 14410)	5-27-24 5-29-24 5-31-24 6- 2-24 6- 2-24	First meetings of May 27, 28, 29, and 31, 1924. Subjects discussed: Hamilton suit; Hart suit; Proposed suits on Brookfield and Lott against T. R. & B.; O'Neill suit; Proposed suit v. Miller; Dropping U. S. Glass appeal; Interference—gab and Headley & Thompson.	For Owens: C. B. Belknap, Carter, Milans. For Hartford: Honiss, Krey, Brown, Feller.
2	1874(R.14414A)	6- 7-24	Second meeting, 6-7-24. Subjects discussed: Proper circuit in which to sue Miller and desirable judge; Patents to be used to sue [illegible] (Lott); Proper parties as plaintiffs; Whether Owens or Hartford patents to be supported to control art; Handling Lott so as not to injure forthcoming Feller patents; Suit against T. R. & B.	For Owens: H. W. Carter. For Hartford: Feller, Brown; also Byrnes.
3	H-5517 (Fol. 63179).	7- 7-24	Conference of 7-7-24. Subjects discussed: Lott rebuttal in interference 36376; Headley & Thompson interference.	For Hartford: Honiss, Milans, Brown, Dorsey. For Owens: Carter, C. B. Belknap.
4	1875 (R. 14418A)	10-15-24	Conference of 9-30 and 10-1-24. Subjects discussed: Strategy as to various cases, interferences.	For Hartford: Feller, Honiss, Hatch. For Owens: Rule.
5	72 (R. 12561)...	10-16-24	Conference of 10-16-24. Subjects discussed: Suit against T. R. & B. on Lott if T. R. & B. declines ultimatum to sell out; Agreement with Miller.	For Hartford: F. G. Smith, H. K. Smith, E. W. Smith, Brown, Honiss. For Owens: Baker, C. B. Belknap.
6	H-5863 (R. 15514).	1-13-25	Conference of 1-13-25 re Headley & Thompson.	Dorsey, W. J. Belknap.
7	644 (R. 13303)...	5- 4-25	Conferences of 4-29 and 4-30-25. Discussion of patent situation with particular relation to Hazel-Atlas.	For Owens: W. J. Belknap, C. B. Belknap, Carter. For Hartford: R. D. Brown; F. G. and H. K. Smith.
8	1909 (R. 14543)	6-18-25	Conference of 6-18-25. Discussion of T. R. & B. claims.	Belknap, Carter, Dorsey.
9	718 (R. 13419)...	About 7- 9-25	Conference re T. R. & B. applications...	C. B. Belknap, "Hartford attorneys."

No.	Exhibit	Date	Conference	Present
10	1878 (R. 14424)	10-15-25	Conference lasting 10-13 through 10-15-25. Detailed discussion of patent applications.	For Owens: Carter, Milans, Belknap, Krey. For Hartford: Dorsey, Brown, Parham.
11	1906 (R. 14445) 1837 (R. 14365)	8-22-25	Conference in Washington 8-22-25. Detailed discussion of pending interferences.	Carter, Dorsey, Krey.
12	614 (R. 13240)	9- 2-25	Conference on 9-2-25 re interferences	J. F. Rule, R. D. Brown.
13	1732 (R. 14203)	12- 8-25	Litigation against Miller users, conference of 12-8-25.	For Owens: W. J. Belknap, Carter, Krey. For Hartford: Dorsey: Parham, Brown, For both parties: Byrnes, Lawrence.
14	1909 (R. 14454)	1- 8-26	Conference of 1-8-26 on interferences	For Owens: Carter, Milans. For Hartford: Dorsey, Hatch, Brown.
15	626 (R. 13271)	4- 6-26	Conference of 4-6-26 on feeder litigation.	For Hartford: Dorsey, Parham, Brown. For Owens: Carter, Williams also Lawrence, Byrnes, W. J. Belknap.
16	1879 (R. 14427)	9-15-26	Conference of 9-15-26 on interferences	For Hartford: Dorsey, Peiler, Brown, Parham. For Owens: C. B. Belknap, Milans, Carter. Also W. J. Belknap.
17	628 (R. 13276)	9-12-28	Conference of 9-9-28 re litigation	W. J. Belknap, Dorsey, Brown, Peiler, H. K. Smith, Williams, Carter.
18	1880 (R. 14430)	1-24-29	Conference of 1-8-29 re litigation and interferences.	For Owens: C. B. Belknap, Soubier, Rule. For Hartford: Peiler, Hatch, Parham.
19	645 (R. 13306)	12- 6-30	Telephone conference re litigation	Carter, F. G. Smith.
20	129 (R. 12644B)	12- 2-31	Conference on Hazel-Atlas litigation	Levis, F. G. Smith.
21	1739 (R. 14215)	3-15-32	Conference on T. R. & B. application	Carter, C. B. Belknap, W. J. Belknap, Milans, Dorsey, Brown, Parham, Bates.

SECTION VI

AMOUNTS PAID BY HARTFORD TO OUTSIDERS FOR PATENT CONTROL (BR. 164)

Summary

Paid for patent acquisitions (Schedule A)	$ 3,696,586
Paid by Hartford to Owens (Schedule B)	9,375,004
Paid by Hartford to Hazel (Schedule B)	11,832,918
Total	24,904,508

This total does not include the dividends paid by Hartford on 43% of its stock granted in 1922 to Empire Machine Company, which amounted to approximately $4,500,000 for the years 1923–1940, inclusive (Ex. 617, R. 13244, Ex. H–5002, R. 8506). Nor does this include the preferred stock dividends paid by Hartford to Howard stockholders from 1923 to 1929, inclusive, which amounted to $371,418 for the years 1923 to 1929. Payments made by Hartford and Owens to attorneys and other expenses in connection with patent litigation, such as the $8,000 payment to William Clarke, as well as separate payments made by Owens for patents or applications, such as $500,000 for O'Neill assets and $125,000 for Lynch and Ed. Miller suction rights, are likewise not included.

SCHEDULE A.—*Patent acquisitions*

Acquisition	Date	Paid by	Exhibit Nos.	Amount
Miscellaneous [1]	1922-1939	Hartford	973 (R. 7984–8022)	$94,061
Hitchcock	1918 to 1921	Hartford	1865-7 (R. 9512A-13,) R. 4364.	$35,000
Steimer	March 1918	Hartford and Empire.	5 (R. 12360)	2,300
Howard	June 1922	Hartford	R. 818	500,000
Sears & Lobb	Feb. 1925	Hartford and Owens.	Par. 75. Complaint & Owens' Ans. (R. 22, R. 186).	40,000
Headley & Thompson. For Option.	Feb. 1925 to June 1929.	Hartford and Owens.	302 (R. 9019)	[2] 85,000
H. & T. For Option	Feb. 1925 to June 1929.	Hartford. (Return of Feeder Royalties).	302 (R. 9019) 303 (R. 9032) 309 (R. 12863) 1584 (R. 8133)	[2] 350,000
H. & T. For Option	June 1929 to Sept. 1933.	Hartford and Owens.	305 (R. 9039) 306 (R. 9051)	[2] 255,000
H. & T. For Acquisition.	Sept. 1933	Hartford and Owens.	337 (R. 9087)	200,000

See footnotes at end of table.

SCHEDULE A—Continued.

Acquisition	Date	Paid by	Exhibit Nos.	Amount
Miller	July 1925	Hartford and Owens.	80 (R. 12580)	$145,839
Tucker, Reeves & Beatty	Aug. 1925	Hartford and Owens.	80 (R. 12582)	1,600,000
Rankin	Oct. 1928	Hartford and Owens.	111 (R. 12597)	63,500
Kucera	Aug. 1932 to Sept. 1937.	Hartford	565 (R. 9103)	95,000
Nivison-Weiskopf (General Glass).	Sept. 1932	Hartford	288 (R. 9013)	20,000
O'Neill	May 1933	Hartford	264 (R. 8983) 265 (R. 8995)	[1] 85,886
Lynch & Ed Miller	Aug. 1933	Hartford	329 (R. 9065)	125,000
Total				2,696,586

[1] This represents the acquisition by Hartford of the following patents:

Acquisition	Date	Amount
Mayers	Sept. 1922	$28,200
Shackelford	June 1923	1,750
Ripley	Dec. 1923	1,000
Keller	Jan. 1924	400
Budd	Apr. 1924	300
Soubier	Feb. 1926	100
Stedman	June 1926	450
Nagle	Oct. 1926	100
Shively	Mar. 1928	500
Keller	May 1928	300
Amsler	Sept. 1928	2,700
Cox	Apr. 1929	5,000
Budd	Jan. 1930	500
Milliken	Mar. 1930	500
Raeder	May 1930	20,000
Shackelford	May 1932	1,750
Morton & Eckert	May 1933	5,000
Bailey & Sharpe	1933	13,500
Amsler	Jan. 1934	1,250
Low	June 1934	100
Bethel	Sept. 1934	2,500
Skiles	June 1935	1,800
Hartle	Oct. 1935	300
Diffenderffer	Dec. 1935	750
Dixon	Sept. 1936	1,500
Frink	Apr. 1937	2,000
Nagle	Jan. 1938	500
Amsler	May 1938	250
Sharp	Dec. 1939	1,061
Total		94,061

[1] Approximate and rounded figures.

SCHEDULE B.—*Paid by Hartford to Owens*

	Exhibit Nos.	Amount
Free Feeders in the years 1924 to 1932, inclusive, at $11,000 a feeder.	55, Sec. 5 (R. 8534); R. 6753.	$1,485,000
Share of Royalties 1924 to 1932	782 (R. 7930g)	2,470,533
Share of Royalties 1933 to 1935	782 (R. 7930g)	2,344,561
Payment October 1, 1935, to March 15, 1938, in lieu of royalties.	568 (R. 9111)	2,500,000
Share of Settlements 1924 to 1935,[1] inclusive	1155 (R. 13778); 190 (R. 8878)	575,000
Total		9,375,094

Paid by Hartford to Hazel

Share of royalties 1932 to 1940, inclusive	Impounding Order, Court Finding No. 14 (R. 516).	$10,034,080
Amounts paid in by Hartford to Court pursuant to Impounding Order, May 14, 1941, to April 30, 1942.		1,798,838
Total		11,832,918

[1] Share of Owens in damages paid by Hazel and Ball only.

Section VII

(BR. 303)

The following is a summary of the acts of those individual appellants, not heretofore discussed,[1] as to whose individual liability an issue has been raised in appellants' briefs.

Appellant *Quay* was elected a director of Hazel in 1935 to fill a vacancy created by the resignation of Levis, with the understanding that he would represent Illinois Glass Company and that Levis would receive through him the same type of information that Levis had been receiving while a director of Hazel. After the dissolution of the Illinois company in 1938, Quay continued to represent those individuals who had been stockholders of Illinois and who had received Hazel stock. As secretary of Hazel, he attested the 1932 contracts with Hartford and Owens (U. F. 597, R. 7394).

Appellants *Paull, Gee, Holloway* and *Seabright,* as directors of Hazel, instructed McNash and Quay to sign the 1932 contracts with Owens and with Hartford, and ratified the action of McNash and Quay in signing them. As directors, Gee, Holloway, and Seabright voted to instruct the proper officers of Hazel to sign the 1935 agreements with Owens and with Hartford (U. F. 598, R. 7395).

[1] See pp. 300–303, *supra.*

Appellants *W. H. Ball* and *Edmund F. Ball,* as directors of Ball, ratified and confirmed the 1933 agreements with Hartford, Knox, and Brockway (U. F. 614, R. 7398).

Appellant *Petty* has been a director of the Association since 1936, and of Ball since September 21, 1935. From January 7, 1930, until sometime in 1940, he was assistant secretary of Ball and since then has been secretary. As assistant secretary, he attested the March 25, 1933, agreement between Ball and Hartford. As secretary, he attested the August 1, 1940, amendment to this agreement which contained the Corning field exclusions (U. F. 615, R. 7398).

Appellant *Martin,* at a 1934 conference with Safford of Hartford, made an agreement that although a feeder license from Hartford to Owens was to be non-exclusive for insulators, nevertheless "Hartford would first discuss" with Owens "any new licenses for insulators" which in the future Hartford might be asked to issue to others (F. 569, R. 7389–90; Ex. 1281, R. 13874). In December 1934, Martin actively assisted Hartford in the collection of information to be used by Hartford in its suit against Swindell for alleged infringement of Hartford's lehr patents (U. F. 570, R. 7390).

Appellant *McNerney,* as secretary of Owens, was present at the meeting of its board of directors which had submitted to it the report of Carter (Ex. 141, R. 12673; Ex. 1650, R. 14069) which brought to his attention facts indicating that the 1932 agreements with Hartford and Hazel violated the antitrust laws. In addition,

McNerney was present at meetings of the board of Owens at which it authorized or approved the 1932 contracts with Hartford and Hazel of 1932, the purchase of the O'Neill assets and the licenses from Lynch and Hartford in 1933, and the 1935 agreements with Hartford (U. F. 571–2, R. 7390).

Appellant *Boeschenstein,* as a director of Owens, ratified and approved the purchase of the O'Neill assets, the exclusive suction license from Lynch, and the contract with Hartford relating to the Headley and Thompson applications (U. F. 580, R. 7381), and the 1935 agreements with Hartford (U. F. 581, R. 7392). As vice president of Owens, he signed the second supplemental agreement with Hazel in August 1933 (U. F. 582, R. 7392), and was active in matters relating to the possibilities of excluding newcomers from entering the glassware industry.[2]

Appellants *Barnard, Greenhalgh,* and *McAdoo,* as directors of Owens, approved the 1935 contracts with Hartford (U. F. 587–8, R. 7393; U. F. 590, R. 7393). Appellant Barnard has been a director of the Association since 1937 (U. F. 587, R. 7393).

Appellant *Knight,* as a director of Owens, approved and authorized the exercise of the option for the purchase of the O'Neill business; and ratified and approved the purchase of this business as well as the exclusive license from Lynch, the contract with Hartford relating to the Headley and Thompson applications and the 1935 agreements with Hartford (U. F. 589, R. 7393).

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[2] F. 583, R. 7392; Ex. 487, R. 13104A; Ex. 837, R. 13501; Ex. 865, R. 13528.

Appellant *Root* arranged for the purchase by Owens of Root Glass Company on September 16, 1932, and on that date he became a director of Owens. As a director he authorized the 1935 contracts with Hartford. He attended a meeting with appellants Levis, McNash, and I. J. Collins in 1932 "at which meeting Levis, Root, and McNash urged" Collins to surrender the license which General Glass had from Hartford to manufacture fruit jars (U. F. 591, R. 7393).[3]

Appellant *Schwenck,* as president of a subsidiary of Owens, signed the 1924 Owens-Hartford agreement. As a director of Owens he authorized the execution of the 1932 agreements with Hartford and Hazel; he authorized Levis to exercise the O'Neill option, and subsequently ratified and approved the purchase of the O'Neill assets, the exclusive suction license from Lynch, the license from Hartford relating to the Headley and Thompson applications, and the 1935 agreements with Hartford (U. F. 592, R. 7394).

Appellant *McClure,* as vice president and general sales manager of Hazel attended a meeting in 1933 with representatives of Owens, General Glass, and Capstan to discuss the situation with respect to the manufacture of beer bottles by Hartford licensees. He has been a director of the Association since 1925 and president since 1932 (U. F. 594, R. 7394).

[3] Although Owens failed to controvert this finding in its assignment of errors (R. 7746–76), it attempts to challenge it in its brief (Br. 91–2).

Section VIII

INSTANCES OF PARTICIPATION BY OWENS IN CONSPIRACY SUBSEQUENT TO 1935 AGREEMENTS (BR. 326)

1. Owens recognized that its cancellation in 1935 of its agreement with Hartford not to use or to grant sublicenses under its direct license from T. R. & B. was more a matter of form than of substance (F. 434, R. 7367; Ex. 761, R. 13445).

2. Owens, under the 1935 agreement with Hartford, received $2,500,000 in quarterly payments until March 1938, in lieu of what Owens might have expected to receive under the 1932 contract (F. 429, R. 7366; Ex. 568, sec. 4, R. 9111; cf. R. 1376; R. 2984–5; U. F. 435, R. 7367).

3. Owens received its share of Ball Brothers' infringement damages paid to Hartford after October 1, 1935 (U. F. 436, R. 7367).

4. Levis, president of Owens, consulted H. C. Mandeville, chairman of the board of directors of Thatcher, concerning a joint acquisition of a milk bottle company (U. F. 437, R. 7367).

5. Levis continued to hold shares of Thatcher's stock on behalf of himself and other directors of Owens, as well as for Illinois Glass (U. F. 438, R. 7367).

6. Quay continued to represent Levis on Hazel's board of directors (U. F. 597, R. 7395).

7. After consultation with Hartford, Owens purchased the equipment of Rawleigh Glass Company in March 1936 (U. F. 439, R. 7367) in order

to take this equipment off the market (R. 1131; Exs. 290–1, R. 12831–3; Ex. 1688, R. 9504).

8. Owens continued to participate in the activities of the Association (U. F. 440, R. 7368). Owens' Pacific Coast subsidiary continued to be a member of the West Coast branch of the Association and regularly attended meetings (Exs. 1721–3, R. 14155–7; cf. R. 1923–4).

9. Owens retained its exclusive suction license from Lynch (U. F. 445, R. 7368).

10. Owens and Lynch agreed that Lynch would not sell its PGB machines to others than Owens (R. 2823–6; Ex. 751, R. 13442).

11. Hartford turned down two applicants for licenses in Texas, after consultation by its president with the president of Owens (F. 442, R. 7368; Ex. 505, R. 13115; R. 3152–3; R. 3230–1).

12. Appellant Belknap of Owens secured a promise from appellant I. J. Collins that Anchor Hocking would not start to market heat-resistant ware without prior discussion with Corning (F. 443, R. 7368; Ex. 372, R. 12939).

13. Owens tried to dissuade Corning from going into the container field (Ex. 715, R. 13413; R. 3357–8).

14. Hartford refused an application for a license by Day of Detroit because it was unable to obtain the consent of Owens which, by agreement between them, was necessary before any new license could be granted. (F. 441, R. 7368; *supra*, pp. 322–3.)

15. Owens continues to own patents covering the stationary pot and other inventions acquired from O'Neill (U. F. 444, R. 7368).

16. Owens, until January 1942, had an exclusive license from Hazel on its suction inventions (U. F. 445, R. 7368).

17. The ware restrictions in Hartford's 1935 license to Owens were not removed until January 1942 (U. F. 446, R. 7368).

18. Control of licensing of suction continued to be allotted to Owens and control of licensing of gob feed to Hartford (F. 430, R. 7366; cf. F. 431, R. 7366; Ex. 571, R. 9126; Ex. 572, R. 9131); and Owens continued to be excluded from Corning's field (F. 432, R. 7366–7) under the 1935 agreements.

19. Owens continued to restrict its production of fruit jars, pursuant to an oral understanding with Hazel, Hartford and Ball (F. 383, R. 7385; *supra*, pp. 151–4; 290–2).

20. In the 1935 Owens-Hazel contract, Owens' contingent license to Hazel excluded Corning's fields of ware (Ex. 572, R. 9131; see *supra*, pp. 319–20).

Section IX

EXHIBITS CITED SHOWING RECORD PAGE WHERE ADMITTED (BR. 7)

Number	Admitted
1	R. 736
3	R. 658
5	R. 658
6	R. 662
7	R. 666
8	R. 668
9	R. 670
10	R. 672
14	R. 680
15	R. 1062
16	R. 696
19	R. 697–8
20	R. 702
21	R. 703; 4027; Fol. 1356
22	R. 770
23	R. 743–4
24	R. 725
25	R. 572–3; 1062–3
26	R. 732
27	R. 734–5
31	R. 572–3; 1062–3
32	R. 573; 1062–3
33	R. 1063
34	R. 1062
35	R. 1062
36	R. 767
37	R. 776–7
43	R. 785
49	R. 802
50	R. 803
51	R. 806
52	R. 806
55	R. 810
57	R. 814–5
58	R. 825
59	R. 818
61	R. 820
62	R. 820
64	R. 823
66	R. 824
68	R. 826
72	R. 832
73	R. 839
76	R. 839
77	R. 845
79	R. 842
80	R. 844
82	R. 868–9
90	R. 868–9
97	R. 868–9
99	R. 868–9
103	R. 868–9
109	R. 847
110	R 848
111	R. 848
114	R. 573; 853
115	R. 852
116	R. 855
117	R. 856
118	R. 856
119	R. 856–7
120	R. 857
121	R. 859
122	R. 863
123	R. 873
126	R. 879
129	R. 891
136	R. 905

Number	Admitted
137	R. 905
138	R. 905
140	R. 913
141	R. 914
142	R. 917
143	R. 917
144	R. 917
145	R. 917
146	R. 917
147	R. 917
148	R. 917
149	R. 917
150	R. 919
151	R. 928
152	R. 930
154	R. 931
155	R. 932
161	R. 941–2
162	R. 943
163	R. 947
165	R. 950
168	R. 954
169	R. 955
173	R. 963
176	R. 972
177	R. 974
178	R. 977
181	R. 984
189	R. 993
191	R. 994
195	R. 3030
198	R. 998
199	R. 999
201	R. 1001
202	R. 1003
203	R. 1004
204	R. 1004
206	R. 1012
207	R. 1012
210	R. 1014
211	R. 1014
212	R. 1015
213	R. 1016
220	R. 1021
222	R. 1022
223	R. 1022
226	R. 1025
231	R. 1032
232	R. 1033

Number	Admitted
233	R. 1063
234	Fol. 2061
235	Fol. 2063
237	R. 1039
239	R. 1042
240	R. 1043
243	Fol. 2076; R. 1044
244	R. 1044
246	R. 1045
248	R. 1047
253	R. 1065
255	R. 1065
257	R. 1065
260	R. 1069
261	R. 1074
263	R. 1076
264	R. 1077
265	R. 1077
266	Fol. 2141
271	R. 1096
276	R. 573; 1106
278	R. 1112
287	R. 1126
288	R. 1128
290	R. 2241
291	R. 2241
295	R. 1136
296	R. 1137
298	R. 1137
302	R. 1140
303	R. 1140
305	R. 1142
306	R. 1143
309	R. 1146
310	R. 1149
311	R. 1149
313	R. 1153
314	R. 573; 1157
320	R. 4139
324	R. 4169-70
326	R. 4170
329	R. 1179
330	R. 1182
331	R. 1182
335	R. 1184

Number	Admitted
337	R. 1184
338	R. 1185
341	R. 1187
345	R. 1189
346	R. 1189
347	R. 1190
348	R. 1190
349	R. 1190
350	R. 1191
352	R. 1193
354	R. 1193
355	R. 1194
356	R. 1194
357	R. 1194
358	R. 1194
361	R. 1195
362	R. 1195
363	R. 1196
364	R. 1196
365	R. 1198
366	R. 1198
367	R. 1198
368	R. 1198
369	R. 1200
370	R. 1200
371	R. 1201
372	R. 1201
373	R. 1202
374	R. 1202
376	R. 1206
377	R. 1207
378	R. 1207
382	R. 573; 1219
388	R. 573; 1226
390	Fol. 2411
392	R. 1230
395	R. 573; 1235
396	R. 1237
397	R. 1237
399	R. 1240
401	R. 1242
405	R. 1244
406	R. 573; 1246
408	R. 573; 1246
409	R. 1247
411	R. 1248
415	R. 1275
417	R. 1279–80
418	R. 1280
419	R. 1285–6
421	R. 1288
422	R. 1292
423	R. 1293
424	R. 1293; 3392
425	R. 1293
430	R. 1296
431	R. 1296
432	R. 1297
433	R. 1297
434	R. 1304–5
435	R. 1305
439	R. 1306
440	R. 1307
441	R. 1307
442	R. 1308
444	R. 1308
445	R. 1309
446	R. 1309
447	R. 1309
448	R. 1309
449	R. 1310
450	R. 1310
451	R. 1310
452	R. 1310
453	R. 1310
454	R. 1310
455	R. 1310
456	R. 1310
457	R. 1310
458	R. 1310
459	R. 1310
460	R 1310
463	R. 1312
464	R. 1312
466	R. 1312
469	R. 1312–3
470	R. 1313
471	R. 1313
472	R. 1313
473	R. 1313
474	R. 1314

Number	Admitted
476	R. 1315
477	R. 1315
479	R. 1315
482	R. 1317
483	R. 1317
484	R. 1318
487	R. 1323
489	R. 1325
490	R. 1325
491	R. 1325
492	R. 1325
493	R. 1325
494	R. 1325
497	R. 1328
503	R. 1331
504	R. 1331
505	R. 1332
506	R. 1334
507	R. 1335
508	R. 1336
509	R. 1336
510	R. 1336
511	R. 1337-8
512	R. 1337-6
513	R. 1338
514	R. 1338
515	R. 1338
516	R. 1338
517	R. 1338
520	R. 1342-3
521	R. 1342-3
522	R. 1342-3
523	R. 1343
524	R. 1343
525	R. 1343
527	R. 1343
532	R. 1351
533	R. 1351
534	R. 1351
535	R. 1352
536	R. 1353
550	R. 1358-9
551	R. 1360
552	R. 1360
553	R. 1360
554	R. 1360
555	R. 1361
556	R. 1361
557	R. 1362

Number	Admitted
558	R. 1363
559	R. 1364
560	R. 1365
561	R. 1365
562	R. 1365
563	R. 1366
564	R. 1367
565	R. 1369
567	R. 1377
568	R. 1380
569	R. 1380
570	R. 1380
571	R. 1380
572	R. 1380
573	R. 1380
574	R. 1380
577	R. 1384
578	R. 1388
579	R. 1388
580	R. 1388
583	R. 1388
585	R. 1389
586	R. 1391
589	R. 1392
590	R. 1392
591	R. 1494
597	R. 1505
599	R. 1532
600	Fol. 2965
601	Fol. 2965
602	Fol. 2965
603	Fol. 2965
604	Fol. 2965
605	Fol. 2965
606	Fol. 2965
607	Fol. 2965
610	R. 1574
611	R. 1575
612	R. 1576
613	R. 1576
614	R. 1577
616	R. 1578
617	Fol. 3012
618	R. 1580
619	R. 1582
620	R. 1582
621	R. 1582
622	R. 1583
623	R. 1584

Number	Admitted
625	R. 2315
626	R. 1536
627	R. 1536–7
628	R. 1537
629	R. 1538
630	R. 1538
631	R. 1590
634	R. 1591
635	R. 1595
636	R. 1595
640	R. 1597
643	R. 1603
644	R. 1604
645	R. 1605
650	R. 1610
656	R. 1628
657	R. 1655
658	R. 1656
659	R. 1657
660	R. 1657
661	R. 1657
662	R. 1657
665	R. 1661
667	R. 1662
670	R. 1663
671b	R. 1664; Fol. 3158
676	R. 1685
677	R. 1685
679	R. 1691
681	R. 1694; Fol. 3212
699	R. 1715
700	R. 1715
703	R. 1720
710	R. 1750
715	R. 1753
717	R. 1784
718	R. 1785
738	R. 1838
740	R. 1891
743	R. 1916
744	R. 1917
745	R. 1917
746	R. 1918
751	R. 1921
761	R. 2083
764	R. 1940
765	R. 1941
766	R. 1941
767	R. 1941
768	R. 1941
769	R. 4257
775	R. 1957
782	R. 1990
783	R. 2002
787	R. 2006
789	R. 2008
793	R. 2013
806	R. 2054–5
809	R. 2059
810	R. 2062
811	R. 2063
820	R. 2106
823	R. 2115
824	R. 2115
825	T. 2115
827	R. 2117
829	R. 2197
833	R. 2133
837	R. 2157
840	R. 2166
859	R. 2220
860	R. 2226
861	R. 2226
863	R. 2235
865	R. 2235
879	R. 2268
895	R. 2278
889	R. 2286
891	R. 2288
900	R. 2310
907	R. 2345
908	R. 2345
918	R. 2356
919	R. 2398
922	R. 2400
925	R. 2402
926	R. 2402
927	R. 2403
928	R. 2405
932	R. 2407; Fol. 4488
944	R. 2423
946	R. 2444
952	R. 2463
954	R. 2478
956	R. 2481
958	R. 2488

Number	Admitted
963	R. 2536
973	R. 2573
991	R. 2644
996	R. 2647
997	R. 2667
998	R. 2669
1002	R. 2799
1026	R. 2740
1046	R. 2796
1077	R. 2813
1086	R. 2817
1087	R. 2817
1088	R. 2817
1089	R. 2818
1090	R. 2820
1091	R. 2818
1092	R. 2818
1098	R. 2820
1099	R. 2820
1105	R. 2831
1109	R. 2834
1110	R. 2834
1111	R. 2834
1115	R. 2836
1126	R. 2907
1137	R. 2931
1140	R. 2932
1142	R. 2937
1154	R. 2948
1155	R. 2953
1159	R. 2958
1161	R. 2975
1164	R. 2981
1165	R. 2981
1166	R. 2981
1169	R. 2998
1170	R. 3000
1181	R. 3035
1184	R. 3051
1193	R. 3054
1217	Fol. 5593
1225	R. 3066
1228	R. 3068
1235	R. 3081
1247	R. 3083
1248	R. 3084
1249	R. 3084
1250	R. 3084
1252	R. 3085

Number	Admitted
1256	R. 3085
1258	R. 3089
1259	R. 3091
1266	R. 3138
1270	R. 3150
1272	R. 3161
1277	R. 3211
1281	R. 3217
1290	R. 3250
1292	R. 3255
1294	R. 3258
1300	R. 3266
1301	R. 3266
1302	R. 3266
1306	R. 3267; 4004
1308	R. 3269
1309	R. 3270
1310	R. 3270
1311	R. 3272
1313	R. 3274
1314	R. 3274
1315	R. 3275
1318	R. 3277
1319	R. 3277
1323	R. 3278
1325	R. 3279
1339	R. 3374
1340	R. 3392
1352	R. 3428
1354	R. 3429
1355	R. 3431
1356	R. 3431
1363	R. 3437
1367	R. 4258
1368	R. 3454
1377	R. 3488
1388	R. 3518
1389	R. 3522
1389A	R. 3527
1389B	R. 3596
1390–1485	R. 4258
1504	R. 3726
1505	R. 3726
1506	R. 3737
1507	R. 3737
1512	R. 3777
1513	R. 3778
1522	R. 3782

Number	Admitted
1527	R. 3795
1528	R. 3796
1546	R 3806
1547	R. 3806
1551	R. 3807
1569	R. 3941
1576	R. 3941
1582	R. 3941
1583	R. 3941
1584	R. 3941
1595	R. 3941
1596	R. 3941
1597	R. 3941
1602	R. 3941
1605	R 3941
1606	R 3941
1607	R 3941
1613	R. 3941
1614	R. 3941
1618	R. 3941
1620	R. 3941
1621	R. 3941
1622	R. 3941
1624	R. 3941
1625	R. 3941
1626	R. 3941
1628	R. 3941
1629	R. 3941
1632	R. 3941
1636	R. 3941
1639	R. 3942
1650	R. 3942
1663	R. 3942
1665	R. 3942
1668	R. 3942
1675	R. 3880
1688	R 3944
1713	R. 3971
1714	R. 3971
1716	R. 3971
1717	R. 3978
1720	R. 3979
1721	R. 3980
1722	R. 3980
1723	R. 3980
1731	R. 4156–7
1731A	R. 4156–7
1731B	R. 4156–7
1731C	R. 4156–7
1732	R. 4010
1733	R. 4011
1735	R. 4011
1739	R. 4014
1740	R. 4016
1743	R. 4019; 4046
1745	R. 4023
1746	R. 4256
1747	R. 4025
1748	R. 4025
1749	R. 4026
1750	R. 4035
1752	R. 4030
1753	R. 4041
1758	R. 4086
1759	R. 4088
1761	R. 4094
1765	R. 4104
1766	R. 4105
1769	R. 4107
1772	R. 4611
1773	R. 4127
1778	R. 4130
1779	R. 4131
1780	R. 4144
1782	R. 4611
1785	R. 4182
1790	R. 4611
1800	R. 4196
1807	R. 4201
1808	R. 4202
1809	R. 4204
1814	R. 4210
1815	R. 4210
1816	R. 4210
1818	R. 4211
1820	R. 4211
1823	Fol. 9764
1823A	R. 5464
1824	R. 5455
1824A	R. 5455
1824B	R. 5455
1824C	R. 5455
1830	R. 4235
1832	R. 4241
1835	R. 4241
1836	R. 4241
1837	R. 4242

Number	Admitted
1838	R. 4242
1839	R. 4242
1841	R. 4244; 4249
1842	R. 4244
1844	R. 4245
1849	R. 4249
[illegible]	R. 4250
1852	R. 4250
1853	R. 4250
1855	R. 4551
1857	R. 4251
1861	R. 4253
1865	R. 4635
1866	R. 4635
1867	R. 4647–8
1869	R. 4673
1870	R. 4674
1873	R. 4712
1874	R. 4716
1875	R. 4717
1876	R. 4718
1877	R. 4718
1878	R. 4719
1879	R. 4719
1880	R. 4721
1883	R. 4787
1889	R. 5182
1891	R. 5196
1892	R. 5217
1893	R. 5233
1894	R. 5234
1896	R. 5251–2
1906	R. 5282
1908	R. 5287
1909	R. 5289
1910	R. 5293
1911	R. 5293
1919	R. 5297
1922	R. 5420
1923	R. 5420
1925	R. 6004
1928	R. 6005
1329	R. 5551
1940	R. 5756
1950	R. 6002
1954	R. 6003
1955	R. 6004
1958	R. 6005

Number	Admitted
1959	R. 6005
1960	R. 6006
1962	R. 6007
1966	R. 6016
1968	R. 6018
1969	R. 6018
1971	R. 6019
1972	R. 6019
1984	R. 6142–3
1986	R. 6143
1987	R. 6143
1988	R. 6143
1989	R. 6143
1993	R. 6369
1994	R. 6497
1995	R. 6498
1996	R. 6498
1997	R. 6498
1999	R. 6498
2000	R. 6720
2001	R. 6720
2005	R. 6746
2007	Fol. 11995
2012	R. 6773
2013	R. 6793
2037	Fol. 11975
2040	Fol. 11975
2041	Fol. 11975
2043	Fol. 11975
2047	Fol. 11975
2050	Fol. 11975
2053	Fol. 11975
2061	Fol. 11975
2063	Fol. 11975
2068	Fol. 11975
2071	Fol. 11975
H–5001	R. 1403–4
H–5002	R. 1426; 4544
H–5004	R. 1430
H–5006	R. 1440
H–5012	R. 1456–7
H–5018	R. 1460
H–5027	R. 1475
H–5030	R. 1477
H–5031	R. 1477
O–5041	R. 1672–3
O–5042	R. 1672–3
O–5043	R. 1672–3

Number	Admitted
O-5044	R. 1672-3
O-5045	R. 1673
O-5046	R. 1673
O-5047	R. 1674
C-5049	R. 1763
H. A. 5074a	R. 2513
H. A. 5074b	R. 2513
H. A. 5076B	R. 2520
H. A. 5080	R. 2538-9
H. A. 5081	R. 2539
H. A. 5084	R. 2590
H. A. 5087	R. 2601-2
H-5108	R. 2871
H-5109	R. 2872
H-5110	R. 2872
A. H. 5121	R. 3020
A. H. 5123	R. 3022
A. H. 5124	R. 3022
A. H. 5125	R. 3022
A. H. 5126	R. 3022
A. H. 5127	R. 3022
A. H. 5128	R. 3022
H. E. 5130	R. 3174
H. E. 5136	R. 3185
H. E. 5137	R. 3186
H. 5138	R. 3186
H.E. 5146	R. 3189
H.E. 5152	R. 3195
H.E. 5185	R. 3316
H.E. 5186	R. 3342
G. C. A. 5188	R. 3553
G. C. A. 5189	R. 3553
H-5196	R. 3603
O-5208	R. 3755-6
O-5209	R. 3756
O-5210	R. 3756
O-5213	R. 3758
H-5217	R. 3810
H-5220	R. 4610
H-5221	R. 3814
H-5222	R. 3814
H-5223	R. 3817
H-5224	R. 3818
H-5230	R. 3822; 4610
H-5233	R. 6737
H-5236	R. 3827
H-5237	R. 3827-8
H-5239	R. 3829

Number	Admitted
H-5243	R. 3834-5
H-5244	R. 3834-5
H-5248	R. 3862
H-5249	R. 3862
H-5253	R. 6737
H-5258	R. 6737
H-5259	R. 6737
H-5260	R. 6737
H-5261	R. 6737
H-5262	R. 6737
H-5263	R. 6737
H-5264	R. 6737
H-5266	R. 6737
H-5267	R. 6737
H-5270	R. 6737
H-5279	R. 6737
H-5280	R. 6737
H-5281	R. 6737
H-5282	R. 6737
H-5284	R. 3865
G. C. A. 5295	R. 3925
H-5347	R. 4336
H-5356	R. 4458; 6667
O-5366	R. 4587
O-5367	R. 4587
O-5368	R. 4587
O-5369	R. 4587
O-5370	R. 4587
O-5382	R. 6300
O-5383	R. 6300
H-5395	R. 4871
H-5398	R. 4881
H-5399	R. 4883
H-5400	R. 4885
H-5405	R. 4890
H-5422	R. 4914
H-5423	R. 4920
H-5428	R. 4933
H-5446	R. 4992
H-5448	R. 4998
H-5504	R. 5064
H-5513	R. 5075
H-5516	R. 5079
H-5517	R. 5079
H-5531	R. 5305
H-5532	Fol. 9491
C-5553	R. 5508
C-5563	R. 5536

Number	Admitted
H-5741	R. 5728
H-5742	R. 5728
H-5747	R. 5730
H-5749	R. 5733
H-5750	R. 5733
H-5751	R. 5733
H-5758	R. 5983
H-5781	R. 5983
H-5782	R. 5983
H-5790	R. 5983
H-5793	R. 5805
H-5794	R. 5805
H-5795	R. 5805
H-5803	R. 5838
H-5803A	R. 6809
H-5835	R. 5976
H-5843	R. 5986
H-5847	R. 5988
H-5848	R. 5989
H-5849A	R. 5989-90
H-5849B	R. 5990
H-5851	R. 5991
H-5856a	R. 5992
H-5856b	R. 5992
H-5863	R. 5996
H-5876	R. 6060
H-5878	R. 6063
H-5880	R. 6063
H-5882	R. 6067
H-5884	R. 6072
H-5888	R. 6088
H-5920	R. 6134-6
H-5926	R. 6139
O-5948	R. 6244-5
O-5952	R. 6263
O-5978	R. 6302
O-5979	R. 6302
O-5994	R. 6370
O-5995	R. 6371
O-5997	R. 6372

Number	Admitted
O-6001	R. 6382
O-6005	R. 6388
O-6006	R. 6390-1
O-6009	R. 6390-1
O-6014	R. 6390-1
O-6016	R. 6395
O-6018	R. 6397
O-6019	R. 6397
O-6020	R. 6398
O-6022	R. 6399
O-6024	R. 6400
O-6025	R. 6400
O-6026	R. 6402
O-6030	R. 6403; Fol. 11, 382
H-6048	R. 6443
O-6076F	R. 6489
GCA-6084	R. 6624
GCA-6087	R. 6624
GCA-6089	R. 6625
GCA-6091	R. 6626
H-6100	R. 6674
H-6103	R. 6680
H-6105	R. 6683
H-6106	R. 6683
H-6112	R. 6693
H-6113	R. 6695
H-6128	R. 6735-7
H-6133	R. 6735-7
H-6135	R. 6735-7
H-6139a	R. 6735-7
H-6139b	R. 6735-7
H-6141	R. 6735-7
H-6142	R. 6735-7
H-6143	R. 6735-7
H-6149	R. 6735-7
O-6173	R. 6749-50
O-6183	R. 6753

SECTION X
(BR. 8)

[Identity of individuals referred to in the brief]

*Ackerman, Emory G.	Assistant business manager of the Association from 1928 until January 1, 1941; since then president of Thatcher.
*Arkell, Bartlett	President and director of Hartford-Fairmont from 1912 to 1922; director of Hartford since 1922; now chairman of the board of directors.
Baker, H. H.	Treasurer of Owens from 1916 to 1926.
*Ball, Edmund F.	Director of Ball since March 25, 1933.[1]
*Ball, Frank C.	President and a director of Ball from 1901[1] until his death in 1943.
*Ball, George A.	Officer and director of Ball since 1882.
*Ball, W. H.	Director of Ball since March 25, 1933.[1]
*Barnard, R. H.	Vice president of Owens since April 16, 1930, and director since July 12, 1935.
Bentty, J. M.	President of Federal Glass Company from 1925[1]; deceased.
*Belknap, C. B.	Patent attorney for Owens from 1918 until April 1933; executive vice-president and director of Owens from April 1933 to January 1941; vice chairman of the board of directors of Owens since January 1941.
Belknap, W. J.	Patent attorney for Owens and subsequently for Hartford; died in 1941.
Blair, J. C.	Vice president of Owens from 1917 until January 1, 1924.
*Boeschenstein, Harold	Vice president of Owens from April 1929 to October 2, 1938; director of Owens since April 1933.
*Boshart, W. H.	Officer of Owens from June 16, 1908, to January 2, 1930; president of Owens from 1925[1] to January 14, 1930; director of Owens since November 14, 1911; member of statistical committee of Association from March 1928 until 1930.

*Indicates appellants.

[1] Although the record indicates that he held this position earlier, this is the first definite date that appears in the record.

*Bridges, E. G.	Director of Lynch since 1933.[1]
*Brown, Robson D.	Patent attorney for George Howard prior to 1924; resident patent counsel for Hartford since April 1924; director of Hartford since 1932; treasurer from 1934 to 1936; vice president since 1937.
Byrnes, C. P.	Counsel for Hartford since 1924[1]; counsel for Whitall-Tatum Company.
Carter, Henry W.	Resident patent attorney for Owens from October 1, 1920; treasurer from February 1926 until April 1929; vice president from about 1930 to 1934.
Chamberlin, P. D.	Inventor for Corning and Empire.
*Champeau, Theodore L.	Treasurer of Hartford.
Clarke, William P.	President of the Flint Glass Workers Union; purported author of article in National Glass Budget in 1926.
Cochrane, S. S.	Vice president and general factories manager of Owens in 1926.
*Collin, H. E.	Director of Owens since July 23, 1926.
*Collins, Isaac J.	Director of Hartford from May 4, 1926, until February 1938; president of Hocking from 1905 until 1938; president of Anchor Hocking since 1938; president and director of General Glass from 1931 to 1937; member of the statistical committee of the Association from 1931 to date.
Corbett, Edwin P.	Patent attorney for Tucker and Reeves from 1922[1] to 1925; on Hartford retainer from 1925 until 1931; counsel for Anchor Hocking from 1940[1] until death in 1941.
*Curtiss, William H.	Assistant to the president of Corning from April, 1926[1]; vice president of Corning from October 12, 1932[1] to date; director of Corning since February 9, 1937.
*Day, Arthur L.	Director of Empire from 1909 to August 1939; vice president of Corning in 1919 and 1920.
	Detroit attorney who represented a group attempting to secure a license from Hartford in 1936.

*Indicates appellants.

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*Dilworth, J. D	Officer of Salem Glass Works, Anchor Cap Corp. and Anchor Hocking; party to the Agreement for the Formation of Hartford.
*Doll, A. G	Vice president of Lynch since 1933.
Dorsey, Vernon M	Patent attorney for Corning since 1898; patent attorney for Hartford since May 1916.
*Eldred, Roger M	Production manager of Hartford in 1928; assistant to vice president from September 1924 to October 1925; assistant manager of Hartford from October 1925 to May 1929; manager of Hartford from May 1929 to December 1936; vice president of Hartford since December 1936.
*Falck, Alexander D	Director of Hartford since 1923; director and president of Empire from 1915[1] until 1941; director of Corning since March 1920[1]; chairman of the board of directors of Corning since 1928.
*Fisher, W. V	Vice president and general manager of Anchor Hocking.
Frazier	Connected with Simplex Engineering Company; accompanied Collin and Haselton on visit to Amsler-Morton in 1934.
*Fulton, T. C	Secretary-treasurer of Hocking and General; officer and director of Anchor Hocking.
*Gee, H. W	Director of Hazel since July 1932[1]
Geer, Paul L	Officer of Amsler-Morton Company since May 1918.
Greene, Victor J	Succeeded to business of William J. Miller in 1925.
*Greenhalgh, George P	Director of Owens since July 12, 1935.
*Griffis, Stanton	Director of Thatcher from September 1928[1] until January 1, 1941.
Hartley, Harry D	Officer of Turner Glass from 1926 to 1930; member of statistical committee of the Association from March 1928 until December 1930.
Hatch, R. F	Employed in the patent department of Hartford since 1920; author of Clarke article.

*Indicates appellants.

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Hazelton, Ben F., Jr.	Vice president of Owens from September 16, 1930 until March 19, 1937; director of Owens from January 20, 1931 until death on February 3, 1940; named as a defendant herein.
Heintzelman, H. L.	Director of Hartford from 1916[1] to 1926 when succeeded by appellant I. J. Collins; officer of Monongah Glass Company from 1904 until about 1927; deceased.
*Holloway, William W.	Director of Hazel since July 1932.[1]
Honiss, William H.	Patent attorney and engineer for Hartford since 1912; named as a defendant herein; died in 1940.
Hornbrook, H. H.	Counsel for Ball in 1933; deceased.
Houghton, Alanson B.	Director of Corning since 1919[1] and director of Hartford from 1922 until death in 1941; named as a defendant herein.
*Houghton, Amory	Director of Hartford since 1932;[1] director of Empire from August 7, 1928 until 1941; director of Corning since 1928.
Houghton, Arthur A.	Director of Corning from 1919[1] to 1928, director of Hartford from 1922 until death on April 10, 1928.
*Houghton, Arthur A., Jr.	Director of Hartford since 1930;[1] director of Empire from 1938 until 1941; director of Corning since 1930.
Howard, George	President of Howard Automatic Glass Feeder Company in 1923; since 1923 employed by Hartford.
*Knight, W. W.	Director of Owens since April 20, 1932.
Krey, Albert	Patent counsel for Hartford and Owens; associated with V. M. Dorsey.
Kucera, Peter	Inventor of the Kucera Air Displacement Feeder; retained by Hartford from 1922 until 1927.
*Langdon, Jervis	Director of Thatcher since February 13, 1931.[1]
Lawrence, Edward A.	Attorney for William J. Miller from 1923[1] to 1925; retained as attorney by Hartford in 1925 and for several years thereafter.
Levis, R. H.	Vice president of Owens from April 17, 1929, to April 18, 1934; director of Owens from April 17, 1929 to August 24, 1933.

*Indicates appellants.

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*Levis, William R	Vice president and general manager of Owens from April 17, 1929, to January 14, 1930; president and director of Owens from January 14, 1930, until January 1941; chairman of the board of directors of Owens since January 17, 1941; director of Hazel from October 31, 1933, until October 11, 1935; member of statistical committee of Association since March 1928.
Lorenz, Edward H	Engineer for Hartford since 1912.
*McAdoo, F. H	Director of Owens from April 1926 until July 1931, and since April 17, 1935.
*McClure, Walter H	Vice president and general sales manager of Hazel; director of Hazel since October 3, 1933; director of the Association since 1925; president of the Association since 1932.
*McCullough, N. M	Director of Lynch since August 1933.[1]
*McMurtrie, Ux	Representative of Lynch in forming machine deals in 1933; thereafter a director of Lynch.
*McNash, J. Harrison	Director and president of Hazel since 1924; member of statistical committee of Association since March 1928.
*McNerney, John H	Assistant secretary or secretary of Owens since June 1917.
*Mandeville, H. C	Chairman of board of directors of Thatcher from 1929[1] until death in 1943; member of statistical committee of the Association from March 1928 until 1942.
*Mandeville, W. H	Director of Thatcher since 1936.
*Martin, E. F	Assistant secretary of Owens since 1926.
Milnes, Calvin	Patent attorney for Owens.
Miller, Ed	Owner of Miller Machine and Mold Works until business sold to Lynch on August 12, 1933; died in 1935.
Miller, William J	President of Miller Glass Engineering Company until business sold in 1933.
Naples, J. E	With legal department of Owens since 1931.
*Niver, R. W	President of Thatcher from 1930[1] until January 1, 1945.

*Indicates appellants.

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O'Neill, Frank	Inventory of stationary pot and of Knox-O'Neill suction machine, president of The O'Neill Machine Company until 1933 when the business was sold to Owens and Hartford.
Owens, Michael J	Inventor of Owens suction machine; officer of Owens until death on December 27, 1923.
*Paull, L. C	Director of Hazel since July 1932.[1]
*Pease, A. M	Employed by Hartford in licensing department since 1928; in charge of licensing and assistant treasurer since January 1937.
*Peden, J. L	Employed by Corning since 1931;[1] director since February 1938.
*Peiler, Karl E	Engineer for Hartford-Fairmont from 1912 to 1922; director of Hartford-Fairmont in 1922; chief engineer for Hartford since 1922.
*Petty, Fred J	Director of Ball and of the Association since 1936.
*Quay, George S	Secretary of Hazel since July 1932;[1] director of Hazel since 1935.
Reed, A. F	President of F. E. Reed Glass Company, one of the three manufacturers of glass containers not under license from Hartford.
Reeves, William A	Coinventor of Tucker and Reeves feeder owned by partnership of Tucker, Reeves, and Beatty.
Rieman, G. F	President of Capstan from 1920 until January 1, 1937; vice president and director of Anchor Hocking from January 1, 1938, until August 1939; thereafter assistant vice president of Ball; defendant herein, not appealing.
*Root, C. J	President of Root Glass Company prior to September 16, 1932; since then a director of Owens.
Rule, J. F	Resident patent attorney for Owens.
*Seabright, B. H	Assistant to H. K. Smith from 1928 until 1931; since then secretary and resident counsel for Hartford.
*Schwenck, F. W	Director of Owens since April 18, 1928.

*Indicates appellants.

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Schwenafeier, C. W	Associated with Owens from 1901 to 1929, commencing as foreman of the machine shop and ending as general factories manager; employed by Hartford as technical consultant from 1930 to 1936.
*Seabright, B. H	Director of Hazel since July 1, 1932.[1]
*Smith, F. Goodwin	General manager and director of Hartford-Fairmont from 1915 until 1922; president of Hartford-Fairmont in 1922; director and vice president of Hartford from 1922 until 1927; president and director of Hartford since 1927.
Smith, Herbert Knox	Legal adviser to Hartford-Fairmont prior to 1922; director of Hartford-Fairmont in 1922; director, secretary, and general counsel of Hartford from 1922 until death on December 17, 1931.
Soubier, Leonard D	Investigator for Owens.
*Stevenson, Charles R	Business manager of the Association since 1928.
*Sullivan, Eugene C	President of Corning from August 1928 until February 1930; director of Corning since 1929.
Tucker, Oliver M	Coinventor of Tucker and Reeves feeder owned by partnership of Tucker, Reeves, and Beatty.
Underwood, Roy E	President of Knox Glass Bottle Company and its associated companies.
*Watts, J. L	Director and officer of Lynch since August 1933.[1]
*Wellinghoff, E. J	Vice president in charge of sales of Thatcher since August 1927.
*Werbe, Thomas Chandler	President and director of Lynch since 1929.[1]
Williams, Lloyd T	Counsel for Owens since 1922.[1]
Wood, Edmund P	Successively patent counsel for Nivison-Weiskopf, Hartford and Owens.
Wright, John H	President and general manager of Libbey Glass Company (subsidiary of Owens) since 1935.

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